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2530

No. 11919

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

O'KEEFE AND MERRITT MANUFACTURING COMPANY, etc.,
Appellees.

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C.I.O., and PHILIP MURRAY, Individually and as President of the United Steelworkers of America, C.I.O.,
Intervenors.

Transcript of Record
In Four Volumes
VOLUME IV
Pages 1369 to 1778

Upon Petition for Enforcement With Modifications of an Order of the National Labor Relations Board.

Rotary Colorprint, 870 Brannan Street, San Francisco 9-21-48—60

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(Testimony of Lawrence Matrenga.)

Q. Do you know who that was for?

A. Martin Ross.

Q. Would you say that again, and a little louder? A. Martin Ross.

Q. Do you remember when V-J Day was?

A. I do.

Q. How many employees did you have in your department then?

A. About the same amount.

Q. What were you making then?

A. Same thing, faucets, plumbing ware. We were making mostly plumbing ware.

Mr. Garrett: May I have that answer read?

(The answer was read.)

Q. (By Mr. Garrett): Has your department always done outside work for outside people?

A. We have.

Q. You have a regular custom foundry there, have you?

A. Foundry. We run the outside work and before the war we was doing outside work and our work, too.

Q. Is that the way it is right now, today?

A. Not today, no. Make our own work today.

Q. What kind of work is that?

A. Range parts.

Q. About how many men in your department now? A. Between 70 and 80.

Q. How long have you worked there?

A. Oh, 24, 25 years.

(Testimony of Lawrence Matrenga.)

Q. Did you do any work with Johnny Levascos after the election? A. No, sir.

Q. Were you on any committee with Johnny Levascos after the election? A. No, sir.

Mr. Garrett: No further questions.

Mr. Collins: That is all.

Q. (By Mr. Nicoson): You are now working for the Pioneer Electric Company; aren't you?

A. Now I am.

Q. Is that correct? A. Yes.

Q. And all through the war, is it your testimony that you were making these faucets and plumbing things and outside work in your foundry?

A. Yes.

Q. When you went over to Pioneer, when Pioneer took over, whichever is the correct way, did the work you were doing change in any manner?

A. Same thing.

Q. You were doing substantially the same thing now you were doing for O'Keefe and Merritt; is that correct? A. Yes.

Mr. Collins: I object to that as assuming a fact not in evidence. He testified all this outside work went out, and they are just doing Pioneer work now.

Mr. Garrett: I think that is a double barrel question. Part of it referred to the period after V-J Day and part of it referred to now.

Mr. Collins: I move the answer be stricken on that ground.

Mr. Nicoson: All right.

Mr. Collins: May I have the ruling?

(Testimony of Lawrence Matrenga.)

Trial Examiner Kent: Well, of course, it is cross-examination. [1279] I think the record may remain, but I think there may be an ambiguity that may be cleared up.

Mr. Nicoson: I will try.

Q. (By Mr. Nicoson): Prior to February 4th, you were operating foundries at O'Keefe and Merritt, weren't you?

Mr. Nicoson: Strike that.

Q. (By Mr. Nicoson): Prior to February 4th, you were foreman of the foundry of O'Keefe and Merritt; isn't that correct? A. Correct.

Q. And after February 4th you were foreman for the foundry for the Pioneer Electric Company; is that correct? A. Right.

Q. While you were working for O'Keefe and Merritt, before February 4th, you were engaged in foundry business; isn't that correct?

A. That is right.

Q. And after you went over to work for the Pioneer, after February 4th, you were still engaged in foundry business; isn't that correct? A. Yes.

Q. You said something about the change from the outside work, that you are not doing it today. Do you remember that testimony? A. Yes.

Q. When did you stop doing the outside work?

A. Right after V-J Day.

Q. Then it is your testimony that on February 4th you had already discontinued doing the outside work; isn't that correct? A. That is right.

Q. You were then making, or is it your testi-

(Testimony of Lawrence Matrenga.)

mony you were then making stove parts, range parts, and things of that nature?

A. Well, I did a little outside work, when we didn't have enough of the other range parts to do.

Q. But as the range parts work increased you discontinued the outside work?

A. Discontinued the outside work.

Q. Until the time you arrived at the place you were doing nothing in the way of outside work, but you were doing range work? O. Yes.

Q. That is the situation that existed when you went over to Pioneer; isn't that correct?

A. Went over to Pioneer.

Q. That is what is going on now? A. Yes.

Mr. Nicoson: That is all.

Mr. Tyre: I have one question. When did you go on the Pioneer Company payroll? [1281]

The Witness: Give me my first——

Mr. Collins: I object.

Mr. Nicoson: I join in the objection if you will state it. He wouldn't know. How could he?

Mr. Collins: I object on the ground it is improper examination. I asked this man two or three questions about Charlie Spallino. Now we are talking about faucets and when he went to work for Pioneer and a million things.

Mr. Nicoson: It was brought out and you didn't object. I didn't start it. I am just trying to finish it.

Mr. Collins: We are starting off on another. I object.

Mr. Nicoson: I join with you in that objection. I don't think he is qualified to answer that question.

Mr. Garrett: I think he is qualified to answer. As a matter of fact, what is the use of bringing him back here, even if it isn't proper cross?

Mr. Tyre: I will withdraw the question.

Trial Examiner Kent: Are there any further questions?

Mr. Garrett: No questions.

Trial Examiner Kent: You may be excused.

(Witness excused.)

Mr. Collins: Mr. Frank Vaicaro.

FRANK VAICARO

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows: [1282]

Direct Examination

By Mr. Collins:

Q. State your name.

A. Frank Vaicaro.

Q. Mr. Vaicaro, calling your attention to some time prior to the 20th of November, 1945, were you employed by the O'Keefe and Merritt Company?

A. Yes.

Q. What was your job? A. I was foreman.

Q. In what department?

A. Drill press department.

Q. Did you have an employee working for you by the name of Charles Spallino? A. Yes.

(Testimony of Frank Vaicaro.)

Q. Did Charles Spallino ever ask your permission to leave the department? A. No.

Q. He did not? A. No.

Q. Was it customary for Charles Spallino to leave the department in connection with his activities with the Five and Over Club? A. No.

Q. Did he have business that he had to take care for the Five and Over Club, like the running of the lunch stand? A. Yes. [1283]

Q. Did he have business, such as taking care of the candy bar concession, if you know?

A. I don't remember.

Q. Did he have any conversation with you at any time about turkeys? A. Yes.

Q. What was his conversation?

A. He told me he had to go out and issue the turkeys out of the truck.

Q. This was some time before the 20th of November, before the election out there; is that right?

A. Yes.

Q. Did he tell you that he was going out and get cards signed up for A.F.L.? A. No.

Q. When he told you he was going out and issue the turkeys, what did you say to him?

A. I said, "All right."

Q. Did he have any other activities that he had to take care of for the Five and Over Club——

Mr. Collins: I will withdraw that question.

Q. (By Mr. Collins): Did he have any activities in connection with getting himself elected or

(Testimony of Frank Vaicaro.)

keeping himself in office as an officer of the Five and Over Club, that you know of? [1284]

A. I don't get that.

Mr. Collins: Well, I will reframe the question.

Q. (By Mr. Collins): Charlie was kind of a politician out there; wasn't he? A. Yes.

Mr. Nicoson: Ask him if he campaigned it. I don't care. I will stipulate he did. He probably did.

Q. (By Mr. Collins): Did he campaign for re-election as president of the Five and Over Club?

A. No.

Q. Do you know whether he was an officer for re-election in the Five and Over Club?

A. I don't know.

Q. You don't know. A. No.

Q. You don't know whether he campaigned or not? A. Yes.

Q. The answer is yes?

Mr. Nicoson: He said yes.

Q. (By Mr. Collins): The answer is you didn't know whether he campaigned or not? A. No.

Mr. Collins: You may cross-examine.

Mr. Nicoson: No questions. [1285]

Mr. Garrett: No questions.

Trial Examiner Kent: You may be excused.

(Witness excused.)

Mr. Collins: Mr. Frank Doyle.

FRANK DOYLE

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Collins:

Q. Mr. Doyle, what is your first name?

A. Frank.

Q. Frank Doyle. Who are you working for now?

A. O'Keefe and Merritt Company.

Q. Have you exer worked for Pioneer Electric?

A. No.

Q. You will have to talk louder, so the reporter will get it. A. No.

Q. Are you a member of any labor union?

A. No.

Q. Did you ever ask me about whether you should join the A.F.L. or the C.I.O.?

A. I asked you whether you thought I had to join one of them, one or the other, and you told me it was not a closed shop and that I wasn't obliged to join either one of them. So I didn't join. [1286]

Q. Did I tell you you would be discriminated against in some way if you didn't join the A.F.L.?

A. Oh, no.

Q. Did you attend any meetings with myself, Mr. Conway, Mr. Despol——

Mr. Collins: I will reframe the question.

Q. (By Mr. Collins): Did you attend any meetings in my office when either Mr. Despol or Mr. Conway was present? A. One.

(Testimony of Frank Doyle.)

Q. Are you able to fix the approximate date of that meeting?

A. It was the latter part of December, I believe.

Q. Latter part of December? A. Yes.

Q. Was Mr. Conway present at that meeting?

A. No, I don't believe so.

Q. Was Mr. Despol? A. Yes.

Q. Who else was present, to the best of your recollection?

A. There was Joe Sanchez and Fred Rotter, you and myself, Mr. Despol.

Mr. Tyre: I can't hear.

The Witness: Mr. Collins and Mr. Despol. There were two or three others. I don't remember their names. I don't see them here.

Q. (By Mr. Collins): What is jour job at O'Keefe and Merritt? [1287]

A. I am in the service parts department.

Q. You are not a foreman or supervisory officer of any kind; are you? A. No.

Q. Who asked you to come up to my office?

A. I believe that Mr. Levascos asked me to be present, to listen on the proceedings, since I was one of the older employees in the plant.

Q. Now, calling your attention to this meeting in my office at which Mr. Despol was present, did he present me with some sort of a contract on behalf of the C.I.O. that he wanted me to sign?

A. Yes.

Q. Did I say to Mr. Despol, or words to the effect that certain provisions of the contract was acceptable? A. Yes.

(Testimony of Frank Doyle.)

Q. And that certain of them were either not acceptable or would require some more discussion?

A. That is right.

Mr. Nicoson: I can't hear the witness.

The Witness: Yes. I am sorry.

Q. (By Mr. Collins): Was there any mention made at this first meeting you attended of the Pioneer Electric Company?

A. There was some mention made about the taking over and fabricating the parts for the O'Keefe and Merritt. But I don't [1288] recall all of the discussion. I wasn't greatly interested in it. I was listening in on the proceedings at the time.

Q. What did Mr. Despol say when I told him that the Pioneer Electric Company might take over the manufacture of the gas ranges?

A. He said it didn't make any difference, they weren't going to let down just because of them taking over. I believe he said something about straight, straight bind the place and we wouldn't get the steel; some discussion along that line. I can't give you word for word. That was the theme of the discussion.

Q. Did he say anything about all the trouble and expense they had gone to to organize the plant?

Mr. Tyre: I am going to object, Mr. Examiner. I would like to have counsel told once and for all to his own witnesses he must ask questions which are proper and not leading and suggestive questions.

Trial Examiner Kent: I think this question should be reframed.

(Testimony of Frank Doyle.)

Q. (By Mr. Collins): Relate any further conversation you can remember.

A. Well, I remember Mr. Despol saying that they could tie us up and throw a picket line around the plant.

Q. What did I say about that?

A. You said that the head breaking days were a thing of the [1289] past, and that we had ample police protection and none of the employees were afraid now to come through the lines any more, so that wouldn't do much good.

I believe then there was some discussion about the steel. He said they wouldn't get any steel, and I remember you said we had some method of getting some steel in there to keep us going, anyway, for a period of some time. That was the theme of the discussion at that time, as I remember it.

Q. What else was said, if you can remember it?

A. Oh, well, discussion of the contract, various phases were discussed on the contract. I don't remember just what they were.

Q. Now, with reference to this question I just asked you, when I told Mr. Despol that it was in the contemplation of the parties that Pioneer might take over the manufacture of those gas ranges and other products, what did he say in direct response to that statement of mine?

A. Now, you mean when you mentioned the fact that the Pioneer might take over the fabrication?

Q. Yes.

A. He said that it wouldn't make any bit of difference, they weren't going to let down on the

(Testimony of Frank Doyle.)

work they had done in there already; and they were going to go through with it.

Q. Was there anything said about the trouble and expense [1290] they had gone to?

A. Yes. I believe they said they had spent a lot of time and money on those loud speakers out there and literature. [1291]

Q. What did I say when he said he had spent a lot of money on literature and loudspeakers and organizing?

A. If I remember you said you didn't want to see them lose any money on account of that, but you would have to take it up with your superiors, anything that would deal with that. You had no say in the matter, as I understand it, if I remember rightly; something to that effect.

Q. Was there any suggestion on my part concerning a court action?

A. Yes, I remember that you suggested that if he thought there was—it wasn't right that they could take it and bring it before the National Labor Relations Board, I believe.

Q. Prior to the election itself did you ever hear of any contemplated action throughout the plant concerning what Pioneer might do after the war and so on?

Mr. Nicoson: Objected to; immaterial, rumor; hearsay.

Trial Examiner Kent: Read the question.

(The question was read.)

Trial Examiner Kent: He may answer.

(Testimony of Frank Doyle.)

The Witness: Only being interested in our work and job. Since we were all interested in our jobs the discussion went around that the Pioneer might buy out the O'Keefe and Merritt. We didn't know to just what extent. It was talked about by all the fellows down there pro and con. [1292] Nobody knew exactly and nobody had anything official; we weren't told officially what it was exactly.

Q. It was a matter of common knowledge?

A. It was a matter of common knowledge, yes, I think so.

Q. Have you ever at any time heard either myself or anybody in authority at the O'Keefe and Merritt Company threaten to discriminate against anyone for any kind of union activity?

Mr. Nicoson: Objected to as calling for a legal conclusion and beyond the qualifications of this witness; also leading.

Mr. Collins: I will reframe the question.

Q. (By Mr. Collins): Have you at any time heard me or anyone in authority at the company discuss the union activities of any employees?

A. No, I never.

Q. Have you ever at any time heard anybody in authority threaten to take any form of disciplinary action against any employee for activity on behalf of any union?

Mr. Nicoson: Objected to as calling for a legal conclusion of the witness, and also leading.

As counsel stated, I think counsel should be admonished this is his witness and he shouldn't lead him. I suggest your Honor do that.

(Testimony of Frank Doyle.)

Trial Examiner Kent: In view of the general allegations [1293] of the complaint it is pretty hard to frame those questions. I think the answer may be taken.

Mr. Nicoson: I regret the difficulty in framing the question. I still think I have a right to insist they be framed properly.

Q. (By Mr. Collins): You may answer.

Trial Examiner Kent: You may answer.

The Witness: I never heard you or anybody else say that there would be any disciplinary action, if that is what you mean, against anybody that joined a union.

Q. (By Mr. Collins): What instructions, if any, did you receive from anybody in authority concerning your activities with any union?

A. I remember I distinctly asked you whether I had to join the union. I didn't know what was going on down there. You said I didn't have to join any union, regardless of what anyone was to say around—the fellows was talking about whether we join or not join. You said I didn't have to join a union and, of course, I didn't.

Q. Was anybody present when you asked me that, that you can recall? A. Yes.

Q. Who?

A. Bill Cole was in the office when I happened to run [1294] up there. He is my supervisor.

Don't you remember I stepped in and asked what I was to do, do I have to join the union. You said I didn't have to join the union.

(Testimony of Frank Doyle.)

Q. Bill Cole, what is his job? Did you say?

A. He is my supervisor.

Mr. Nicoson: His testimony is he was present or just merely in the office?

Mr. Collins: He was present.

Q. (By Mr. Collins): Was he present?

A. Yes, he was present in the office at the time I came upstairs.

Q. How far away from me was he when I told you that?

A. He was sitting right beside your desk.

Q. Is he a relative of mine?

A. I believe so.

Q. What relation, if you know?

A. I believe he is a brother-in-law.

Q. And he is the foreman of the service department?

A. He is the foreman of the service department, yes.

Mr. Collins: You may cross-examine.

Cross-Examination

By Mr. Nicoson:

Q. Where was Mr. Collins when you asked him if you had to join the union?

A. He was sitting in his office upstairs. He has an office.

Q. In his office? A. Yes, sir.

Q. You went up to his office? A. Yes.

Q. And you asked him if you had to join the union? A. That is right.

(Testimony of Frank Doyle.)

Q. How did you happen to go up there?

A. Well, the union activity was going on and many men had joined the union, and I hadn't joined it and I didn't know what my standing would be if I didn't join the union, so I wanted to clarify it, and it is very hard to catch him in, so when I heard that he was in there I went right on up to see him.

Q. What union activity was going on?

A. I knew there were men joining the various unions down there. I never saw any of them join, but I knew some of them belonged to the A.F.of L. and some of them belonged to the C.I.O.

Q. Was this before or after the election?

A. That is after the election.

Q. After the election. How did you know that there were people joining the A.F.of L. and the C.I.O. down there, tell us about that.

A. Because they were all around me. [1296]

Q. What do you mean they were all around you?

A. Well, my fellow workers.

Q. Did you see them actually signing cards?

A. No, I didn't see them signing cards, but I heard them say they belonged to it.

Q. This was conversation you had among yourselves? A. Just conversation among ourselves.

Q. How long after the election was that going on?

A. Oh, I don't know exactly. I don't remember exactly how long.

Q. Give me your best approximation.

A. Oh, I suppose it was soon after the election.

Q. Soon, within a week?

(Testimony of Frank Doyle.)

A. No, possibly, well, suppose a week, two weeks, three weeks, it was anywhere in those. I can't remember exactly.

Q. Was that about the time you went to Mr. Collins' office when you met Mr. Despol?

A. I beg your pardon? May I have the question again?

Mr. Nicoson: Yes, will you read it to him.

(The question was read.)

A. Oh, no, it was before that.

Q. How long before?

A. Oh—may I ask, you mean when I asked Mr. Collins if I could join the union, was it before I had met Mr. Despol or afterward? [1297]

Q. Yes.

A. Let me see. Oh, it was long afterward.

Q. Long after you met Mr. Despol?

A. Yes.

Q. And this conversation about the employees joining the various organizations, was that also after you met Mr. Despol? A. Yes.

Q. What did Mr. Levascos say to you when he came down there?

A. I can't remember his exact words. He asked me if I wished to attend the meeting on the reading of the contract of the C.I.O. that was being held in Mr. Collins' office, and I said all right, I would listen in on it.

Q. Was that all the conversation you had about it? A. That is all the conversation I had.

(Testimony of Frank Doyle.)

Q. Did you go immediately then to Mr. Collins' office?

A. No, that was—I believe that was, the meeting was not to be held until about 4:30 in the afternoon.

Q. You went up there that afternoon at 4:30?

A. Yes.

Q. Was it on or off working hours?

A. It was off working hours for me, yes.

Q. It was off working hours? A. Yes.

Q. I believe your testimony is that you have never worked [1298] for the Pioneer Electric Company, am I correct in that? A. That is right.

Q. Now, as to the time you went up there, was it before or after Christmas?

A. Oh, after Christmas.

Q. How long after Christmas?

A. Well, it was just probably two months ago, so I would say it was in January, late January.

Q. Could you give us approximately how long after Christmas, just your best guess?

A. I didn't deem it important enough to remember, but I suppose it was a month after Christmas, a month or a month and a half. I wouldn't want to go on record, because I don't know.

Q. At least it is your best recollection that it was after Christmas?

A. I know it was after Christmas, yes, sir.

Q. And possibly a month? A. Yes, sir.

Q. Now, just so the record may be quite clear, was it before you went to the meeting with Mr.

(Testimony of Frank Doyle.)

Collins and Despol that you went to Mr. Collins and asked if you had to belong to the union?

A. No, sir, it was afterward.

Q. Beg pardon? A. It was after. [1299]

Q. It was after this meeting? A. Yes, sir.

Mr. Nicoson: No further questions.

Redirect Examination

By Mr. Collins:

Q. Just a moment, Mr. Doyle. Do you recall any organizing activity prior to the election by either of the unions?

Mr. Nicoson: Objected to as improper redirect, nothing like that covered on cross-examination.

Trial Examiner Kent: He may answer.

A. I don't recall any organizing.

Q. (By Mr. Collins): Did you see anybody wearing any A.F.of L. buttons or any C.I.O. buttons before November 20th?

A. No, I can't recall seeing any, but I know I don't recall seeing any of them.

Q. Did anybody attempt to get you to join the union before November 20th or attempt to get you to vote for either union before November 20th?

A. Not that I remember, sir.

Q. Do you know of your own knowledge whether or not there were any members of the C.I.O. or the A.F.of L. in the plant prior to November 20th?

A. Well, I think there were some, but I didn't know definitely whether they belonged to any union or not. [1300]

(Testimony of Frank Doyle.)

Q. As a matter of fact, you did not concern yourself with union activity at all?

A. No, frankly no. I was hoping to escape that.

Mr. Collins: All right, that is all.

Recross-Examination

By Mr. Tyre:

Q. Mr. Doyle, did I understand you that you never have joined the A.F.of L.?

A. That is right.

Q. Do you recall seeing a notice on the bulletin board, Mr. Doyle, stating that all employees of the Pioneer Electric would have to join the union within 30 days?

Mr. Collins: Just a moment. Objected to as not proper cross-examination. This man is employed by the O'Keefe and Merritt Company. Anything he might have seen on the bulletin board would not tend to prove or disprove anything at issue in this case. It is not proper cross-examination, having not been gone into on direct.

Trial Examiner Kent: The answer may be taken.

The Witness: May I answer?

Trial Examiner Kent: Yes.

The Witness: As a matter of fact, I never have, because I never read those bulletins. I get out of there too fast. I am on my way home.

Q. (By Mr. Tyre): How long have you been working for O'Keefe and Merritt? [1301]

A. About 13 years.

(Testimony of Frank Doyle.)

Mr. Tyre: That is all. You may step down.

Mr. Garrett: One moment.

Q. (By Mr. Garrett): Do you know Mr. Bennett, Mr. Doyle? A. Mr. Bennett?

Q. Yes. A. Yes.

Q. Do you know Charlie Spallino?

A. Yes, I do.

Q. Who is Mr. Bennett?

A. Mr. Bennett is our refrigeration engineer.

Q. Who is the foreman in that department you worked in then? A. Mr. Cole.

Q. Who is your boss there? A. Mr. Cole.

Mr. Garrett: No further questions.

Mr. Collins: That is all.

Trial Examiner Kent: You may be excused.

(Witness excused.)

Mr. Collins: I offer to stipulate at this time that Mr. Joe De Rose, Mr. Joe Sanchez, Mr. Percy Castro, Mr. Milton Daley, and Mr. Joe Orlatti, if called as witness to testify in this proceeding on behalf of the respondents O'Keefe and Merritt Company and Pioneer Electric Company, that they would testify to substantially the same facts as the witness [1302] who has just stepped down, both on direct examination and cross-examination, with the following difference: That none of these boys came to me and asked me if they should join either union. At this time I don't know whether they are members of the union or not. The stipulation would go slightly further than that, that these

particular witnesses were not at the meeting, that is, they were not always together, but in substance the same conversation between Mr. Despol and myself took place in their presence, or at least they will so testify.

Mr. Nicoson: You make it awfully complicated.

Mr. Collins: May we go off the record?

Trial Examiner Kent: Off the record. We will take a recess for five minutes.

(Short recess.)

Mr. Collins: I think there will be a stipulation between myself and the Board's attorney. I want to recall the witness for one more question on redirect.

FRANK DOYLE

a witness called by and on behalf of the respondents, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Collins:

Q. Mr. Doyle, calling your attention to this meeting you attended in my office between various employees [1303] of the O'Keefe and Merritt Company and the C.I.O.'s representative, Mr. John Despol, I am calling your attention particularly to your testimony wherein I asked you, "Do you recall anything about the Pioneer Electric"; and you stated, "Yes, it was mentioned in the meeting," or something to that effect; and I asked you what

(Testimony of Frank Doyle.)

did Mr. Despol say concerning that; his testimony, as I recall, was something to the effect that he had gone to so much expense and so on he couldn't give up. Then you testified I said I might get my clients to cover that expense. What did Mr. Despol say then?

A. As I remember it, Mr. Despol said he didn't wish to talk about it. He would talk about it later, or didn't wish to talk about it at the present time.

Q. What particular words did he use?

A. He didn't wish to talk about any money involved in the expense at this particular time.

Q. Did he use any particular expression?

A. Just that he didn't wish to discuss money matters.

Q. He used the expression he didn't want to talk about money matters? A. As I recall, yes.

Q. I see. Now, then, did I go ahead and discuss with him the question of wages?

A. Yes. I remember that a question of wages came up. They were comparing Gaffers & Sattler, I believe, or various [1304] contracts in our industry, stove industry. You said you would meet them, or better them.

Q. Meet them or better what?

A. Better the rate, rate of pay.

Q. Pay where?

A. In *comparing* industry, such as Gaffers & Sattler or Western Stove Works.

Mr. Collins: That is all.

(Testimony of Frank Doyle.)

Recross-Examination

By Mr. Nicoson:

Q. That was the only discussion about wages that occurred there at that time?

A. Yes, I believe so. That is all I remember discussing.

Q. Mr. Doyle, the question of Gaffers & Sattler was brought up by Mr. Collins; is that your recollection?

A. No, I can't recall who brought it up. I didn't pay a great deal of attention just who mentioned—I know the discussion—it entered into it somewhere. Who brought it up I am not sure.

Mr. Nicoson: No further questions.

Redirect Examination

By Mr. Collins:

Q. Did Mr. Despol ask me to submit to him the rate being paid at the Gaffers & Sattler Company?

A. Did he ask——

Q. Did he want to know what the rate was at Gaffers & Sattler? [1305]

A. I don't remember offhand.

Mr. Collins: That is all.

Recross-Examination

By Mr. Garrett:

Q. Mr. Doyle, directing your attention to the time just before the National Labor Relations

(Testimony of Frank Doyle.)

Board election that was held at the plant, did you ever see Charlie Spallino come into the refrigeration department and give any cards, application cards, to Mr. William T. Bennett?

Mr. Collins: Objected to as not tending to prove or disprove anything at issue in this case. This witness testified he is merely an employee in the stock room, I think, and that Mr. Cole is the foreman. There is no showing the conversation was in front of Mr. Cole. Besides that it is a matter not brought out on direct examination.

Mr. Garrett: I will admit——

Mr. Nicoson: I join in the objection.

Mr. Garrett: ——it is not cross-examination. But this man Spallino testified that he gave certain cards—this isn't cross-examination—but it is rebuttal and I will have to call him tomorrow, and he is now on the stand.

Mr. Collins: I withdraw my objection.

Trial Examiner Kent: The answer may be taken.

Mr. Garrett: I will call him as a rebuttal witness.

Trial Examiner Kent: We don't follow the strict rules. If questions are material to the issues I think they may [1306] be answered.

Mr. Garrett: After conceding this is not proper cross-examination and calling this man as a rebuttal witness, I ask permission to put the question again, subject to whatever objections may be made.

Trial Examiner Kent: Yes, you may.

Q. (By Mr. Garrett): Prior to the election, did you ever see Charlie Spallino come into the

(Testimony of Frank Doyle.)

refrigeration department and give any union membership application cards to yourself and to William T. Bennett? A. No, I don't recall it.

Q. Did you ever see Mr. Charles Spallino come into the refrigeration department or any other department with any union membership application cards? A. No.

Q. Did you ever see Mr. William T. Bennett hand any union membership application cards to Mr. Charles Spallino? A. No, I didn't.

Q. Did you yourself ever hand any union membership application cards to Mr. Charles Spallino?

A. No, I never have.

Q. Did you ever go into the service department in company with Mr. Bennett and get any union membership application cards signed? A. No.

Mr. Collins: That is all.

Mr. Nicoson: No questions.

(Witness excused.)

Mr. Collins: I again wish to offer to stipulate that the witnesses Joe DeRose, Joe Sanchez, Percy Castro, Milton Daley, Joe Arlotti, if they were called to testify on behalf of the respondent would testify as to those matters that occurred within my office, both on direct and cross-examination, the same as the witness Mr. Frank Doyle, who has just left the stand.

Mr. Nicoson: That is with respect to the two meetings where Mr. Despol was present?

Mr. Collins: Yes.

Mr. Nicoson: I will accept that stipulation, of

course, with the reservation we don't admit the truth or accuracy of the testimony.

Trial Examiner Kent: The record may so show.

Mr. Collins: Now I offer further to stipulate that Mr. Johnny Levascos came to my office and said he had heard about the C.I.O. bargaining to be taking place at my office. He requested permission to bring up a committee up there. I stated to him it was all right with me.

Mr. Nicoson: I will accept that with the qualification that Mr. Levascos said to you he wanted an A.F.of L. committee brought up. [1308]

Mr. Collins: Very well.

Mr. Nicoson: And you said O.K., you would leave it up to him as to who he would bring.

Mr. Collins: I will so stipulate.

Mr. Nicoson: I will stipulate to that.

Trial Examiner Kent: The record may so show.

Mr. Collins: I now offer to stipulate these same witnesses that we have just referred to, Joe Sanchez, Joe DeRose, and so forth, would testify if they were called that no one in authority in the O'Keefe and Merritt plant told them that they had to join either union; that the nearest thing they came to receiving any information about the Company's attitude toward the union would have been in one of the speeches they heard Mr. O'Keefe make in public or the speech I made in public, copies of which are already in the record.

Mr. Nicoson: May we go off the record?

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record.

Mr. Collins: Mr. Daley, will you take the stand?

MILTON DALEY

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows: [1309]

Direct Examination

By Mr. Collins:

Q. What is your name? A. Milton Daley.

Q. Mr. Daley, have you ever seen any notice or contract posted in the plant of either the O'Keefe and Merritt or Pioneer Electric Company stating that you had to join the A.F. of L. within thirty days? A. I have not.

Q. Has anyone in authority of the O'Keefe and Merritt Company ever told you that you had to join either union? A. No.

Q. Or indicated to you a preference to join either union, other than the speech made by Mr. O'Keefe? A. No.

Q. Did you hear his speech, incidentally?

A. Yes, I did.

Mr. Collins: You may cross-examine.

Cross-Examination

By Mr. Nicoson:

Q. You are now employed by Pioneer?

A. Yes.

Q. At the time you had the Labor Board elec-

(Testimony of Milton Daley.)

tion down there, were you employed by Pioneer or O'Keefe and Merritt? A. O'Keefe and Merritt.

Q. Do you have a bulletin board down there?

A. Sir? [1310]

Q. Do you have a bulletin board down there?

A. Yes, I have.

Mr. Nicoson: Please mark this for identification.

(Thereupon, the document referred to was marked as Board's Exhibit No. 30 for identification.)

Q. (By Mr. Nicoson): I hand you a document which, for the purpose of identification, has been marked Board's Exhibit 30, and ask you to examine it and state if you have ever seen that before.

Mr. Garrett: May I see it, first?

Mr. Nicoson: I will give you a copy?

Mr. Collins: Is this in evidence?

Mr. Nicoson: Not yet.

The Witness: No, I haven't.

Mr. Collins: Off the record.

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record. Any further questions of this witness?

Mr. Nicoson: No questions.

Trial Examiner Kent: Have you any questions, Mr. Garrett?

Mr. Garrett: Yes, I have, but they are not on cross. I have rebuttal questions to ask this witness.

(Testimony of Milton Daley.)

Mr. Collins. Before we get to rebuttal now, will counsel stipulate if the other four witnesses were called [1311] on direct examination their testimony would be the same as this?

Mr. Nicoson: I will, with the reservation that I do not admit the accuracy of it.

Mr. Collins: Then it will be stipulated that if Mr. Joe DeRose was called, if Mr. Joe Sanchez was called, Mr. Percy Castro and Mr. Joe Arlotti, were called, their testimony would be the same as Mr. Milton Daley, who is now on the stand?

Mr. Nicoson: Yes.

Trial Examiner Kent: You may step down. No, wait a minute, Mr. Daley.

Q. (By Mr. Garrett): What department do you work in, Mr. Daley? A. Machine shop.

Q. Were you working in the machine shop prior to the N.L.R.B. election at the plan?

A. Yes, I was.

Q. Did anybody ever hand you forty cards which were applications for membership in the machinists' organization? A. No.

Q. The International Association of Machinists?

A. No.

Q. Did you ever carry around forty or any other number of such cards with you in the period prior to the N.L.R.B. [1312] election?

A. No, I have not.

Q. Did you ever get any machinists' application cards from Mr. Levascos? A. Yes, I did.

Q. What did you do with them?

(Testimony of Milton Daley.)

A. I passed them among the boys in the machine shop.

Q. All right, what else did you do with them thereafter?

A. I turned them back to Mr. Levascos.

Q. How many of them were there?

A. Well, I would say roughly about ten or twelve.

Q. When you turned them back to Mr. Levascos, were they signed or unsigned?

A. They were signed.

Mr. Garrett: That is all.

Q. (By Mr. Nicoson): When did you get those cards from Mr. Lesvascos?

A. After the day of the election.

Q. After the day of the election, and when did you return them to him?

A. I don't remember the specific day, but it was on the same day that he handed them to me.

Q. How long after the election was it?

A. Well, it was after the day that Mr. O'Keefe made his speech. I can't say exactly what date that was. [1313]

Q. Was it the day after he made his speech?

A. No, it was the same day.

Q. Mr. O'Keefe made at the time of the election or shortly thereafter, he made two speeches, didn't he? Do you recall that? A. Yes, sir. [1314]

Q. In other words, he made a speech just the day before the election, and then about a week after the election he made another speech. Isn't that about correct?

(Testimony of Milton Daley.)

A. I can't remember whether is was just that close.

Q. It has been stipulated here that that is approximately correct, between Mr. Collins and myself, one was the day before the election, and the second was approximately a week after the election. Which one of those two speeches was it after?

A. It was the second speech.

Q. The second speech. A. Yes.

Mr. Nicoson: No further questions.

Mr. Collins: No questions.

Mr. Garrett: No questions.

Trial Examiner Kent: You may be excused.

(Witness excused.)

Mr. Collins: I will call Mr. McNinch.

C. GUY McNINCH

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Collins:

Q. Will you state your full name, Mr. McNinch?

A. C. Guy McNinch. [1315]

Q. Mr. McNinch, were you an observer at an election held between the A.F.of L. and the C.I.O. in the factory of the O'Keefe and Merritt Company on the 20th of November, 1945? A. I was.

(Testimony of C. Guy McNinch.)

Q. Do you know whether or not the employees of Service Incorporated were permitted to vote in that election? A. No, sir.

Q. I didn't hear the answer.

A. They were not permitted to vote.

Q. Do you know how many employees of Service Incorporated there were? A. Not exactly, no.

Q. Was it approximately 14?

A. It was around that figure there.

Q. Do you know whether or not the employees of the Pioneer Electric Company were permitted to vote? A. They were not.

Q. Do you know whether or not Pioneer had any employees on that day?

Mr. Tyre: I will object, no proper foundation.

Mr. Collins: I am asking him if he knows.

Trial Examiner Kent: If you know, you may answer.

The Witness: Yes, sir, they had.

Q. (By Mr. Collins): How do you know there were some Pioneer employees? How do you know that they were Pioneer employees [1316] out there at that time?

A. The Pioneer was doing business.

Q. Did you ever see any badges or anything around the plant?

A. Over in their department, over there in their business.

Q. Can you estimate about how many you saw wearing Pioneer badges?

A. No. There were quite a lot of them. I can't——

(Testimony of C. Guy McNinch.)

Q. Would you say as many as 25?

A. Oh, yes.

Q. Now, then, I will show you Board's Exhibit 12-B and ask you if you have ever seen this list of names before. A. Yes, sir.

Q. Who had this list in his hand during the conduct of the election? A. Charlie Spallino.

Q. Did Charlie Spallino make these little red marks after the various names here?

A. Yes, sir.

Q. Just state in your own words how this election was conducted with respect to that list that you have there.

A. Well, when we were called over, I was the observer and Charlie Spallino was supposed to be, was the A.F.of L. man, and Lewie Ortega was the C.I.O. man. We went over and the lady who had charge of the Board came up to me and handed me a list, this list here, and said, "I would like to have you [1317] check these off." Charlie Spallino stood on my left-hand and he said—took hold of the list and said, "I think I know them better than you do."

Q. So he took the list. Then as the employee came up to vote, who was it that checked him off to see whether or not his name was on the list?

A. Charlie Spallino.

Q. Do you know these people by sight whose names appear on this list?

A. Not by name and sight, no.

Q. Then if somebody came up there and wanted

(Testimony of C. Guy McNinch.)

to vote, if you did not have the list in front of you, you would not know whether his name was on there or whether he was an employee entitled to vote or not, would you? A. No, sir.

Q. Did you have occasion to challenge any votes?

A. Yes, sir.

Q. Referring to—just taking any one out at random, which ones, if any, did you challenge?

A. There was a young man came up to vote and I hadn't seen him around there before, and I thought that I knew some of them, but I had never seen this young fellow before, and I asked who he was and Louie Ortega says, "He is all right. He is all right." Well, I says, "Probably, but this is an election." So the lady that conducted the vote, conducted the [1318] election, says, "Well, if he says he is all right, he is all right." But he says first thing, he says, "I want to vote C.I.O. Where do I mark it?"

"Well, here is the ballot."

"Well," he says, "I don't know where to mark it." And assuming that he could not read because he had the ballot upside down, so he takes the ballot over to the ballot box and comes back and he says, "Where did you say I should vote for the C.I.O.?" And the girl or the lady that conducted the election took the ballot and showed him where to mark for the C.I.O., and so I says, "I contest that vote." And the vote was contested and put in an envelope.

(Testimony of C. Guy McNinch.)

Q. Do you know how many votes were contested?

A. It was either 14 or 16. I would not be positive of which number it was.

Q. And all of the contested votes were eventually counted, were they not? A. No.

Q. Do you know whether or not any of the votes that were contested were thrown out, or were they all permitted to be tallied as part of the ballot?

A. Well, this one vote eventually was put through.

Q. It was?

A. Yes. But the vote that, some of the votes that came from the—— [1319]

Q. Service Incorporated?

A. Service Incorporated were not counted. They were put back in the envelope and she took them along.

Q. Were all the other votes counted except those working for Service Incorporated?

A. A couple of them were not.

Q. Was one of the votes contested, Mr. Bill Gatone? A. That is right.

Q. What was he? What was his job?

A. I knew him as a foreman of the welders.

Q. And did Mr. Joe Arlotti have his vote contested? A. No, sir.

Q. He had substantially the same job, did he?

A. Well, as far as I knew he was a leadman or foreman.

Q. Did you see Mr. Levascos comparing that list

(Testimony of C. Guy McNinch.)

with the people as they came up to vote, or did Charlie Spallino take over the job?

A. Charlie Spallino.

Q. So no one ever looked at this list as the people came up to vote except Charlie Spallino?

Mr. Nicoson: I object to that as assuming a fact not in evidence, leading and suggestive, and not this witness' testimony.

Mr. Collins: I will withdraw the question.

Q. (By Mr. Collins): Did anybody excepting Charlie Spallino, [1320] any of the watchers at the polls, excepting Charlie Spallino, look at that list while the election was going on?

A. I looked at it, but nobody had charge of it at all but him. [1321]

Q. Did you ever see Mr. Johnny Levascos look at the list? A. No.

Q. Now, what I mean to say, while the election itself was going on, that is, while people were coming up there and asking for their ballots, did anyone except Mr. Charlie Spallino have that list in their hand? A. No, sir.

Q. Did anyone besides Mr. Charlie Spallino compare that list with the man that came up and asked for a ballot? A. No, sir.

Mr. Collins: You may cross-examine.

Cross-Examination

By Mr. Nicoson:

Q. Mr. McNinch, there were two lists down there on the day of the election; weren't there?

A. Yes, sir.

(Testimony of C. Guy McNinch.)

Q. In other words, you had one which ran from A to L, and then that ran from M to X; is that right? A. That's right.

Q. You were on the line that ran from A to L; isn't that correct? A. That is right.

Q. Now, Mr. Collins a while ago showed you Board's Exhibit B-12——

Mr. Garrett: 12-B. [1322]

Mr. Nicoson: 12-B. I am sorry.

Q. (By Mr. Nicoson): Now, I will ask you, Mr. McNinch, to look at Exhibit 12-B. That is not the list that Charlie Spallino had; is it? You will notice this runs from L, M and N down to X and Y. That isn't the list you and Charlie had at all; is it?

A. Just a minute. This part that was shown to me right here is (indicating).

Q. This part here with the M on it (indicating)?

A. Yes.

Q. Now, let me show you another one, Mr. McNinch. I am not trying to trap you. I am just trying to get things straight.

This is in evidence as Board's Exhibit 12-A. Now, that runs from A down to and including K.

Mr. Collins: May the record show that has little blue checks, instead of red checks?

Mr. Nicoson: I will conduct the investigation if you don't mind.

Mr. Collins: I don't mind.

Q. (By Mr. Nicoson): That is the list you had, isn't it, Mr. McNinch? A. No.

(Testimony of C. Guy McNinch.)

Q. Isn't it? A. No. [1323]

Q. Who had this list (indicating)?

A. I don't know.

Q. Where was Johnny Levascos when this was going on? A. I don't know.

Q. Is it your testimony that you checked the list from A to L or is it your testimony you checked another list?

Mr. Garrett: He hasn't testified he checked any list.

Mr. Nicoson: Oh, yes, he has.

The Witness: No, I didn't.

Q. (By Mr. Nicoson): Is it your testimony that the list that Charlie Spallino had is the one from A to L or from M to X? Didn't you tell me a while ago Charlie had the one from A to L? That is right; isn't it? A. Yes.

Q. I am not trying to trap you. I want to get this thing straight. Now, I ask you to look at this which is the alphabet, having names from A to K. That is the one that Charlie had; isn't it?

Mr. Collins: Just a minute. I object to the form of this question as assuming a fact not in evidence; no proper foundation laid. The witness has testified that he didn't have a list.

Mr. Nicoson: No, he hasn't.

Mr. Collins: So Charlie Spallino took the list and that is all there was to it. [1324]

Mr. Nicoson: There is no such testimony.

Mr. Collins: I don't want to take up the time of having the reporter read it back.

(Testimony of C. Guy McNinch.)

Mr. Nicoson: I am trying to get the facts from this witness, whatever they are. That is all I want.

Now, put the question. Or is there a ruling?

Trial Examiner Kent: You may take the answer.

(The question was read.)

Q. (By Mr. Nicoson): Isn't that right?

A. Yes.

Q. Now, isn't this also the way it happened: You and Louis Ortega and Charlie Spallino were put down at a table? A. Yes.

Q. And Charlie was in the middle with this list in front of him? A. Yes.

Q. You were on one side and Louie was on the other; is that right? A. Yes.

Q. Which side were you on?

A. I was on Charlie's left-hand.

Q. When a voter came up there he called out his name; isn't that right? A. Yes.

Q. And then you went through—who located the name [1325] on this list?

A. Charlie Spallino.

Q. He put a mark behind it; didn't he?

A. Yes.

Q. Now, was there any time Charlie put any paper or attempted to conceal this list from you?

A. This is the way he held the list (indicating), up like that. [1326]

Mr. Collins: I want the record to show the witness is indicating the list was all curled up in a manner that it would be impossible for anyone sitting to his left to read it.

(Testimony of C. Guy McNinch.)

Mr. Nicoson: I won't so agree to let the record show.

Mr. Collins: Let the witness state how he held it.

The Witness: Any time I wanted to see any particular—whether a man was there or not, I had to ask to see the names.

Q. (By Mr. Nicoson): That is right. The list was always available whenever you wanted to look at it?

A. Not unless I wanted—asked for it.

Q. When you asked for it, was it ever denied you? You couldn't see it? A. No.

Q. Louie Ortega was on the other side?

A. Yes.

Q. He also asked sometimes to look at the list?

A. Yes.

Q. You both worked the same? A. Yes.

Q. And Charlie made the marks as they came along? A. Yes.

Q. With respect to this fellow who came up there and said he wanted to vote a CIO ballot, did he give his name at all? [1327]

A. No. I can say this, though: He was a Mexican because the lady that conducted the election had to interpret some of the things he said.

Q. He came up to her and after she interpreted, she told you what he said? A. Yes.

Q. She told you he said he wanted to vote for the CIO and which square should he put his mark?

A. Yes.

(Testimony of C. Guy McNinch.)

Q. Thereafter she took him over to the booth?

A. No, she didn't.

Q. Marked it right in front of you?

A. He went over to the booth and came back the second time.

Q. And still didn't understand?

A. And still didn't understand.

Q. What further was said to him?

A. Louie Ortega told her he wanted to vote CIO, see.

Q. Yes.

A. And she asked him in Mexican—I couldn't understand it because Louie Ortega talks Mexican. That is what she pointed right on the ballot. Nothing was said about voting for AFL.

Q. Then what did he do with it?

A. He went over to the ballot box and came back to it and I contested the vote. [1328]

Q. Then they sealed it up in a little envelope?

A. Yes.

Q. And put that little envelope in another envelope; didn't they? A. Yes.

Q. On the outside of the big one they wrote this fellow's name; isn't that correct?

A. She wrote something on it, I didn't see it.

Q. What was done with that after they sealed it in both of those envelopes?

A. The lady took care of it.

Q. Are you sure about that? As a matter of fact, it was put in the ballot box, wasn't it?

A. I am not sure what became of it. The bal-

(Testimony of C. Guy McNinch.)

lots were counted and I know they all come out together when the ballots were counted.

Q. You were in there when they opened up the ballot box? A. Yes.

Q. And poured them out on the table?

A. No, sir.

Q. Where did they put them?

A. They were in the box back there. One man picked them out and looked at them and brought them out to her, and she opened them.

Q. Laid them out in front of all the people while they [1329] were counting them?

A. Yes.

Q. The envelopes were all put up in a little pile? A. Yes.

Q. There was more than one of those challenges in there? A. Yes.

Q. I think you said there were about 14.

A. 14 or 16.

Q. They were all put up in a little pile?

A. Yes.

Q. Isn't it a fact that that envelope was not opened? A. Pardon?

Q. Isn't it a fact that the envelope of this Mexican was not opened?

A. Couldn't tell who it was after it was over, they opened it.

Q. Is it your testimony they opened it in your presence? A. Yes.

Q. Now, can you possibly tell us what the name of that man was? A. No, sir.

(Testimony of C. Guy McNinch.)

Q. Could you go down the list of this Board's Exhibit 12-A and pick out the man's name?

A. No.

Mr. Nicoson: I can't release this witness because I [1330] have to go and get the 14 envelopes to show they are still all there.

Mr. Collins: What is the purpose of the question? Maybe I will stipulate and we can get on. Off the record.

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record.

Mr. Collins: While we are waiting, Mr. Nicoson, could I ask the witness one question I have on redirect?

Mr. Nicoson: Yes.

Mr. Collins: Mr. McNinch, at the time that you were seated there beside Charlie Spallino did you know that he was secretly working for the CIO, instead of a watcher for the AFL?

The Witness: No, sir.

Mr. Collins: That is all.

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record.

Mr. Nicoson: Well, your Honor, I don't know whether I win or lose because I am informed all the challenged ballots have been destroyed, so I don't know whether they were counted or not. I have no further questions.

(Testimony of C. Guy McNinch.)

Mr. Collins: Do you have any questions of this man, Mr. Garrett? [1331]

Mr. Garrett: Yes, I have some questions. But I don't think I ought to begin with cross-examination at the hour of 5:00 o'clock, unless I am required to.

Trial Examiner Kent: No, unless it is one or two questions.

Mr. Garrett: No. Are you able to come here again tomorrow morning, Mr. McNinch?

The Witness: Yes, sir.

Trial Examiner Kent: We will recess then until 9:30 tomorrow morning.

Mr. Collins: May the witnesses Mr. Fred Rotter, Mr. Joe DeRose, Mr. Sanchez, Mr. Doyle, Mr. Orlatti, Mr. Castro, be excused?

Trial Examiner Kent: They are the ones covered by the stipulation?

Mr. Collins: Yes.

Trial Examiner Kent: They may be excused.

(Whereupon, at 5:00 o'clock p.m. Tuesday, March 26, 1946, the hearing was adjourned to Wednesday, March 27, 1946, at 9:30 o'clock a.m.) [1332]

Wednesday, March 27, 1946
9:50 o'Clock A.M.

Trial Examiner Kent: We might proceed.

Before we begin, Mr. Nicoson, I believe you told me Mr. Schullman called up and asked you to give me the message he wouldn't be here today.

Mr. Nicoson: That is correct.

Trial Examiner Kent: The record may so show.

Mr. Collins: Mr. McNinch was on the stand. Does anybody want to cross-examine him?

Trial Examiner Kent: Mr. Garrett has some further questioning. When he was excused last night he was excused for further questioning this morning by Mr. Garrett.

Mr. Collins: We might take somebody else out of order.

Trial Examiner Kent: I think that might be a good idea because Mr. Garrett is not here as yet.

Mr. Collins: I will call Mr. Durant.

WILBUR G. DURANT

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Collins: I believe I have a stipulation from Mr. Nicoson, the Board's attorney, that these exhibits that were marked for identification may be introduced in evidence without further foundation being laid. Is that true?

Mr. Nicoson: That is correct. [1337]

Mr. Collins: I now wish to offer Respondent's Exhibits 4, 5, 6, 7 and 8, heretofore marked for identification, in evidence at this time.

Trial Examiner Kent: You might restate the nature of those exhibits. I believe you did at the time. I haven't my notes for that date here.

Mr. Collins: Respondent's Exhibit 4 is the sales

(Testimony of Wilbur G. Durant.)

and use tax returns of the Board of Equalization, which is a form of tax imposed by the State of California on the sale and use of various materials used in manufacturing and resale.

These don't purport to be all the returns, but they are sample returns over a period of years of the Pioneer Electric Company.

The quarterly returns of the California Department of Labor. These are the records whereby the State of California—whereby the employer deducts from the employee and contributes a definite percentage to an unemployment insurance plan in this State.

Mr. Nicoson: Is that Exhibit 5?

Mr. Collins: Yes, that is Respondent's 5. This does not purport to be all the records. There may be one or two returns missing, or something of that nature, but it is substantially all the records of the Pioneer Electric Company with that exception to date.

None of the current records are being filed here because [1338] my client, Pioneer Electric needs those to currently operate their business and make the employment tax returns.

Social Security returns for the Department of Internal Revenue. I feel sure the Examiner and Board will know what they are. They are for the same concern for a substantial period of the time they have operated. Likewise, I am not using the current returns for the reason heretofore stated,

(Testimony of Wilbur G. Durant.)

they are now being used. If you deem it material in my case, I can bring you the current returns.

Mr. Nicoson: Is that Exhibit 6?

Mr. Collins: That is Respondent's 6. What is your disposition on that matter, Mr. Trial Examiner?

Trial Examiner Kent: Well,——

Mr. Collins: Just a moment. Maybe I can settle this.

Q. (By Mr. Collins): Mr. Durant, is the Pioneer Electric Company at the present time keeping separate Social Security returns?

A. Yes, they are.

Q. Separate quarterly returns of the California Department of Employment? A. Yes.

Q. Separate returns of sales and use tax returns for the Board of Equalization? A. Yes.

Q. You make a separate income tax report for the Pioneer [1339] Electric Company?

A. Yes.

Mr. Collins: Do you deem it advisable to have the evidence themselves brought in?

Trial Examiner Kent: Does counsel have any statement to make prior to the consideration?

Mr. Nicoson: If that is his purpose, why, nothing occurs to me that requires the current returns to be filed at this time.

Trial Examiner Kent: I doubt if they are particularly relevant and material, in view of the Board's decision in the Simmons Engineering case.

However, they may be received as rejected exhib-

(Testimony of Wilbur G. Durant.)

its, so that gives you the benefit of having them accompany the record should my ruling be wrong.

(The documents heretofore marked for identification as Respondent's Exhibits Nos. 4, 5, and 6, were rejected.)

Mr. Collins: I now offer Respondent's Exhibit No. 7, which are the photostatic copies of policies of insurance covering Workmen's Compensation for the Pioneer Electric Company from the inception to date, including the current one.

Respondent's Exhibit 8 is our letters from the War Department Office of the Undersecretary, Washington, D.C., Price Adjustment Board, and other miscellaneous letters from [1340] the Army Service Forces dealing with the question of re-negotiations for the Pioneer Electric Company, re-negotiating their profits and getting some of the money back from the government. I wish to offer all of these in evidence at this time.

Mr. Nicoson: I will waive the foundation. I will object to them on the ground they are immaterial and irrelevant.

Mr. Collins: The materiality and the relevancy of these exhibits, from the standpoint of my client, Pioneer Electric Company, is to show that it has from the very beginning kept entirely separate records and has, in fact, been a separate legal entity.

These records, along with the Board's exhibits, particularly the Board's Exhibit No. 22 and the various articles of incorporation—I don't recall

(Testimony of Wilbur G. Durant.)

their numbers right now—indicate that at the present time only 29 per cent of the stock of the O'Keefe and Merritt Company is represented by partners in the Pioneer Electric Company. That is to say, partners in the Pioneer Electric Company at no time have owned more than 29 per cent of the stock of the O'Keefe and Merritt Corporation. That is, at the present time when there are more people from O'Keefe and Merritt in it than there were when it originally was formed in 1942.

I, therefore, believe that these exhibits are highly material to my case. They do, in fact, establish that it is a separate legal entity and there was never any Board election held for the benefit of these employees;

That they were employees in existence all of the time who never had a chance to vote and therefore my client, Pioneer Electric Company, would have had the right to have signed a contract with any union they wanted to at any time prior to an election in their plant.

Trial Examiner Kent: They may be received as rejected exhibits.

(The documents heretofore marked as Respondent's Exhibits Nos. 7 and 8, for identification, were rejected.)

Trial Examiner Kent: They will accompany the record. Should my ruling be erroneous they will be there.

Mr. Garrett: These are rejected exhibits?

(Testimony of Wilbur G. Durant.)

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record.

Q. (By Mr. Collins): Mr. Durant, when did you begin any association with the O'Keefe and Merritt Company?

A. About September, 1941.

Q. Did you come to them with some form of a proposition or did they hire you?

A. I went to them first with a contractual arrangement of my own. [1342]

Q. Will you state to the court just what this arrangement was? Not the terms of the arrangement, but what you had to sell O'Keefe and Merritt, if anything?

A. A combination of our engineering and other companies' engineering and their money to finance, to satisfy the government we could do a two million dollar job.

Q. Did you have any kind of a war contract or anything of that nature that you had negotiated yourself before you came there?

A. That was before the war, but it was a military requirement.

Q. What was this?

A. The building of an ordnance generator set, power unit. You say when or what?

Q. What was it? I want to know how you originally got started with O'Keefe and Merritt?

(Testimony of Wilbur G. Durant.)

A. Briefly, our company didn't have the finance to——

Q. Who was "our company"?

A. Frazier Wright Company. They didn't have the financial backing to satisfy the government we could perform on a $2,000,000.00 engine generator set contract.

Q. What did you do with that?

A. We bid the job as a joint bid between the company and O'Keefe and Merritt, and were awarded the contract.

Q. When you first came in with O'Keefe and Merritt, you came [1343] in with a contract of your other company and came in there to work it out at their plant? A. Right.

Q. You didn't go to work as an employee?

A. No, not then.

Q. So then when the war started, what was your job with O'Keefe and Merritt?

A. After the war started I went to work directly for O'Keefe and Merritt as chief engineer.

Q. Did you have any other connections outside of O'Keefe and Merritt Company as an engineer?

A. No, not at this time.

Q. What has been your average income during the last two or three years?

Mr. Garrett: I don't think anyone ought to be required to answer a question like that. I don't like to take Mr. Durant from his attorney. I think that is most embarrassing, if you ask anyone on the record a question like that in a case like this.

(Testimony of Wilbur G. Durant.)

Mr. Collins: I agree with Mr. Garrett, that it is an embarrassing question. However, Mr. O'Keefe testified this man made between $175,000.00 and $200,000.00.

Mr. Garrett: I am going to object to it as being immaterial. I don't see how it has any bearing on the issues in this case. [1344]

Mr. Collins: I want to show by this line of questioning this man is not an employee of O'Keefe and Merritt. He is an independent contractor and makes a lot of money. He is independent of O'Keefe and Merritt. They need him; he don't need them.

Mr. Garrett: I think Mr. O'Keefe's testimony established that. No doubt Mr. Durant's ears were burning while Mr. O'Keefe was testifying. He thought Mr. Durant was a very valuable man, a man that could make a high rate of——

Mr. Collins: I will withdraw the question.

Q. (By Mr. Collins): Do you have any objection to stating your income or an estimate of it, a rough estimate, for the record?

A. It is better than $100,000.00 a year.

Q. Mr. Durant, how much money did you put into the Pioneer Electric Company as your contribution to capital? A. $30,000.00.

Q. How much did Mr. R. J. Merritt put in?

A. $30,000.00 is one-fourth of the original capitalization. And six others put in one-eighth. $30,000.00 is one-fourth of the original capitalization, and six others were one-eighth.

(Testimony of Wilbur G. Durant.)

Q. I am afraid you are going to have to explain the answer. I don't understand it and I am afraid the Trial Examiner won't.

A. Six people owned one-eighth each. That made three-fourths. [1345] I owned the other one-fourth. All related to $30,000.00.

Q. How much did R. J. Merritt put in?

A. Each put in $15,000.00.

Q. How much did Lewis Boyle put in?

A. $15,000.00.

Q. Marion Jenks? A. $15,000.00.

Q. W. J. O'Keefe. A. $15,000.00.

Q. L. G. Mitchell. A. $15,000.00.

Q. I understand that R. J. Merritt put in the same amount you did. A. No.

Q. He put in how much? A. $15,000.00.

Q. You had twice as much interest as anyone else in this partnership? A. Yes.

Mr. Nicoson: Any one other individual.

Q. (By Mr. Collins): As any other individual in the partnership? A. That is right.

Q. You are the active manager and control of the operation? A. That is right. [1346]

Q. Without going into the nature of outside activities that you intend to engage in, unless you want to tell us at this time, do you now contemplate doing other things than the manufacure of gas ranges or any product O'Keefe and Merritt made prior to the war? A. Yes.

Q. Are you able to give an estimate of how

(Testimony of Wilbur G. Durant.)

much money is going to be required to engage in this activity or any activity you have in mind.

A. Approximately $400,000.00.

Q. When you used the word "you" did you mean yourself personally or the Pioneer Electric Company?

A. No, the Pioneer Electric Company.

Q. Have you already—without telling me what you have done in that connection—initiated this project? Has the Pioneer Electric Company initiated this project you have now testified to?

A. Yes. [1347]

Q. Do you now do anything in the O'Keefe and Merritt factory for the O'Keefe and Merritt Company, other than the manufacture of gas ranges?

Mr. Garrett: I think that question is a little bit ambiguous.

The Witness: Yes, reframe the question so I answer it correctly.

Q. (By Mr. Collins): Do you make any faucets in the foundry?

A. I am not sure whether we are or not; could be.

Q. What products are you manufacturing for O'Keefe and Merritt? A. Gas ranges.

Q. Are you manufacturing generators there?

A. Yes, we are.

Q. Are you selling them yourself?

A. Yes.

Q. By "you" you understand that to mean Pioneer Electric Company?

A. That is right; we are.

(Testimony of Wilbur G. Durant.)

Q. Now, calling your attention to the 20th of November, 1945, do you recall a wall that separated that part of the O'Keefe and Merritt factory from the part that was at that time leased to the Pioneer Electric Company? A. Yes. [1348]

Q. Was that wall up or down, as far as you can recall, the 20th of November, 1945?

A. It is so close to that date, as to whether it was up or down, I can't say. It would be a matter of a week one way or the other, I would think.

Q. When did the Pioneer Electric Company or yourself, as an individual, first have any conversation with the O'Keefe and Merritt Company relative to the manufacture of gas ranges?

A. Well, relative——

Mr. Nicoson: I think I am going to have to object to that as being a double-barreled question. I will have to ask counsel to separate which is which.

Mr. Collins: Very well.

Q. (By Mr. Collins): When did you first have any conversation with the O'Keefe and Merritt Company relative to the manufacture of any of their products?

A. Well, virtually since 19—since the inception of Pioneer, about 1942.

Q. When did you first have any conversation with the then partners of the Pioneer Electric Company relative to admitting you to the partnership?

A. 1942.

Q. 1942? A. That is right.

(Testimony of Wilbur G. Durant.)

Q. Frankly, from the beginning then you were trying to get [1349] into the partnership and make gas ranges? A. That is right.

Q. Now, will you relate the conversation that you had with any partner of the Pioneer Electric Company relative to admitting you to partnership, giving us the time and place and the persons present?

Mr. Tyre: I am going to object to this, your Honor. It calls for hearsay and is not binding upon the CIO, at least. I don't think it is binding on the Board. It is a conversation between persons, neither of whom are binding to the CIO or Board.

Mr. Collins: In Mr. Tyre's position the CIO representative should have been present at this conversation four years ago?

Mr. Garrett: There weren't any CIO representatives present at a great many of the conversations that have been testified to here.

Mr. Nicoson: I think, in the interest of clarity——

Trial Examiner Kent: I will take the answer.

Mr. Nicoson: ——he ought to identify who was present and who made the statements.

Trial Examiner Kent: Yes. With that limitation I think that the testimony may be material. But I think the parties should be identified.

Q. (By Mr. Collins): Who did you talk to in the Pioneer [1350] Electric Company?

A. I have talked to everybody in the Pioneer

(Testimony of Wilbur G. Durant.)

Electric Company and the O'Keefe and Merritt Company for four years about this thing. I can't identify a time or place.

Q. Do you recall any particular conversation that you ever had with Mr. O'Keefe of the O'Keefe and Merritt Company?

A. I can give you the conversation but I can't recall the time or place there. They are old, they are between two and three years old.

Q. Very well, give us a conversation.

Mr. Tyre: May I have an understanding I am continuing to object to this line of testimony concerning conversations between the witness and Mr. Daniel P. O'Keefe?

Trial Examiner Kent: Yes. The objection may go to the line.

The Witness: We organized the Pioneer Electric Company for various purposes in 1942. I have consistently operated the company for the betterment of both O'Keefe and Merritt and Pioneer. As a manufacturing company we plan, at the close of the war, to take on the operation of the manufacture for O'Keefe and Merritt Company, or any other purpose, as far as that goes.

Trial Examiner Kent: I rather gathered from Mr. O'Keefe's testimony that O'Keefe and Merritt handled the sale and laid out the production schedule for Pioneer. [1351]

The Witness: That is right. It has been the purpose of O'Keefe and Merritt Company to carry on, by reason of their name, the sales of the com-

(Testimony of Wilbur G. Durant.)

pany. The manufacture is secondary to the sales in that case. Whereas we have no sales or intention of sales; we as Pioneer. We are strictly manufacturers.

Trial Examiner Kent: I think Mr. O'Keefe also testified——

Q. (By Mr. Collins): You mean by that you don't intend to sell anything at all?

A. We will sell it, but not actively as a sales company.

Q. Do you mean by that you are going to sell—or you are not going to sell generators or anything else?

A. We will sell them, but not as you might consider—as I would, rather—an active sales company. For example, we have one salesman; that is all we need.

Q. Does this one salesman sell gas ranges?

A. No.

Q. Your one salesman is going to sell other products you manufacture? A. Yes.

Q. O'Keefe and Merritt sales organization will sell the gas ranges? A. That is right.

Q. Do you as an individual have any outside activities? Are you manufacturing anything or have you any contracts on the outside of either O'Keefe and Merritt or Pioneer at the [1352] present time? A. Yes.

Q. What are these activities, if you care to state them?

A. I am president of the Sales Engineering Company.

(Testimony of Wilbur G. Durant.)

Q. What does that concern manufacture?

A. They are sales representatives entirely separate from either Pioneer and O'Keefe and Merritt, but in engineering line such as valves and that type of equipment.

Q. Do you have any springs or upholstering equipment that you are now manufacturing or contemplating manufacturing?

A. I own one-third of a company that is developing automatic spring machine, and we have a patent on the springs.

Q. Now, when you had these conversations with O'Keefe and Merritt or Pioneer Electric concerning admitting you to their partnership and giving Pioneer permission to manufacture gas ranges, were you able to point out any advantages that might accrue to the O'Keefe and Merritt Company, as the result of this association? I am referring specifically now to either the efficiency of the operation, tax savings, OPA ceilings and things of that nature?

A. Yes, we have a different class of quality manufacture which we have had to have during the war. We afford somewhat of a tax saving, about 12 per cent, on certain items. And we have, as a company not engaged before the war, we have certain OPA—our job with the OPA is easier for the reason we [1353] have no past history before the war on certain items.

Q. Have your tax consultants told you there are OPA and tax savings by virtue of the operation?

A. Yes.

(Testimony of Wilbur G. Durant.)

Q. Was the Pioneer Electric Company able to operate more efficiently? Did you use that as an argument of any kind to get yourself into this deal?

A. Yes. I would say I would operate the Pioneer Electric Company more efficiently than O'Keefe and Merritt has operated it.

Q. Did O'Keefe and Merritt attempt to have their generators built outside before the Pioneer Electric was organized, and the inception?

A. Yes, we did have them built.

Q. Did that cost more or less than Pioneer could do it for? A. It cost more than double.

Q. Did you get efficient delivery before Pioneer took over?

A. Not to satisfy the war requirement.

Q. Did the O'Keefe and Merritt Company have any engineers at all working for them when they were manufacturing gas ranges prior to the war?

A. One.

Q. One. Does the Pioneer Electric Company have any engineers working for it now?

A. Yes. [1354]

Q. How many? A. About 10.

Q. Has the Pioneer Electric Company installed any new or different method of manufacturing the gas ranges than were used by O'Keefe and Merritt prior to the war?

A. Some, but we will, of course, have many more. In other words, we have just started manufacturing gas ranges.

Q. Were there any changes, or are there any

(Testimony of Wilbur G. Durant.)

changes that will be made—strike that. Now, then, as of February 4th, the day you took over the operation of the O'Keefe and Merritt's factory, did you at that time put any changes into effect? That is, the very minute you took over?

A. Did we?

Q. Yes.

A. Oh, about February 6th I left and since then have been home less than 10 days, since February 6th. I am not too familiar with how many changes we have made. Of course, they have been made.

Q. You contemplate making changes?

A. Sure; that is right, we do.

Q. I will ask you this question: Would it be physically possible for you to change the methods of making the ranges the minute you took over, or the minute you take over? Asking you as an engineer, is it physically possible to do that?

A. No, it would not be. [1355]

Q. How long do you estimate it will take for you to put in efficient methods and so forth that you, as an engineer, have in mind, from the date of February 4th?

A. Take us the better part of this year.

Q. The balance of this year? A. Yes.

Q. Do you know whether or not O'Keefe and Merritt was manufacturing gas ranges before you took over on—were they manufacturing gas ranges on the 28th of January? A. No.

Q. Were you manufacturing gas ranges on the 4th of March—I mean on the 4th of February?

(Testimony of Wilbur G. Durant.)

A. No. We were processing parts, but we weren't manufacturing gas ranges.

Q. Were there any appreciable number of parts being manufactured or processed by O'Keefe and Merritt Company prior to February 4th when you took over?

A. Yes; the appreciable part being 25 per cent.

Q. 25 per cent of the parts being manufactured?

A. Yes.

Q. Did you at that time, knowing that you were going to take over this operation, within a matter of months, did you have anything to do with getting that type of work started in the O'Keefe and Merritt factory, you or your staff, your engineers?

A. Prior to that time very little.

Q. Very little. When did you first know that you were going to get the deal to be taken into the Pioneer Electric Company and a contract with O'Keefe and Merritt to manufacture?

A. Right after the war.

Q. Right after the war?

A. Yes; be last year.

Q. Did you ever tell anybody around O'Keefe and Merritt plant you were going to be admitted to the partnership and the partnership was going to make gas ranges? A. Did I tell anybody?

Q. Yes. A. The principals.

Q. The principals. Do you know whether or not there was a general rumor around the factory that Pioneer was going to take over the manufacture of the gas ranges?

A. Yes, I think there was.

(Testimony of Wilbur G. Durant.)

Q. That was right after the close of the war?

A. That was in the months of November and December, at least.

Q. Did any representative of the National Labor Relations Board ever ask the Pioneer Electric Company whether or not they would consent to have their name placed on a ballot between the CIO and the AFL? [1357]

A. Not to my knowledge.

Q. Or did any representative of the National Labor Relations Board ever ask the Pioneer Electric Company to permit their employees' names to be added to any list of people voting in a National Labor Relations Board conducted election?

A. Not to my knowledge.

Q. Did any representative of the C.I.O. ever ask you or any other representative of the Pioneer Electric Company for permision to bargain for the employees of the Pioneer Electric Company?

A. Not to my knowledge.

Q. Did they ever ask you that? A. No.

Q. Did any of your associates ever tell you they had been approached by the C.I.O.? A. No.

Q. After the election was conducted and this rumor you are talking about was current, did any representative of the C.I.O. ever ask you for permission to bargain for those employees of yours?

A. No.

Q. Has any representative of the C.I.O. ever contacted you with reference to representing these employees to date? A. No.

(Testimony of Wilbur G. Durant.)

Q. Have they contacted your attorney or anybody else in connection [1358] with your organization you haven't heard of? A. No.

Q. Is that right? Yes or no?

A. That is right. I have not heard of it.

Q. Now, prior to November 20, 1945, did you ever see any A.F.L. buttons on any of the employees of the Pioneer Electric Company?

A. I think so.

Q. After the election did you ever see any buttons of the A.F.L. on employees of the Pioneer Electric Company? A. No.

Q. Along about the 1st of December and thereabouts in 1945, did you ever see any buttons on the employees of the—strike that. Now, I am now referring to the employees of the O'Keefe and Merritt Company as being those prior to February 4th.

A. Yes.

Q. And Pioneer Electric Company took over after February 4th. Don't confuse my question in your mind. I want you to distinguish between O'Keefe and Merritt and Pioneer Electric employees. With that in mind, when did you first begin to notice A.F.L. buttons circulating around the factory there, either of O'Keefe and Merritt or Pioneer employees?

A. Well, there had been all the time I have been there some A.F.L. buttons in the plant. [1359]

Q. Both in the Pioneer and the O'Keefe and Merritt? A. Yes.

Q. Now, is it your testimony there were A.F.L.

(Testimony of Wilbur G. Durant.)

buttons on the employees in the Pioneer Electric Company prior to the election in November of 1945?

A. Yes, we had a couple of hundred employees.

Q. Is it your testimony now that there were or were not buttons of the A.F.L. on employees of the Pioneer Electric Company prior to February 4, 1946? What I am getting at is how did you know whether or not the A.F.L. had a majority of employees.

Mr. Tyre: Just a minute.

Mr. Nicoson: Just a minute. You have been doing pretty good up to now. We can't let you testify all morning. We want to find out what this witness knows.

Q. (By Mr. Collins): Did any representative of the American Federation of Labor ever contact you with reference to bargaining for the employees of the Pioneer Electric Company? A. Yes.

Q. When did they first contact you to the best of your recollection?

A. About the 1st of February.

Q. About the 1st of February. Did you have any telephone——

Trial Examiner Kent: That is this year?

The Witness: Yes. [1360]

Q. (By Mr. Collins): Did you have any telephone communications from representatives of the American Federation of Labor before the 1st of February of this year?

(Testimony of Wilbur G. Durant.)

Mr. Nicoson: Objected to unless counsel lays a better foundation.

The Witness: No.

Q. (By Mr. Collins): What was the answer?

Mr. Nicoson: I move the answer go out for the purpose of interposing an objection. Anyone with the A.F.L. would take in something like five or six, twelve million people. That is a little indefinite, I think, even for our purposes.

Trial Examiner Kent: The answer is stricken at the request of counsel.

Mr. Collins: Was the objection ruled on?

Trial Examiner Kent: Yes. It was moved it might be stricken——

Mr. Nicoson: I now interpose an objection because there is no sufficient foundation laid, no parties established that were present, or time or place.

Trial Examiner Kent: I will sustain the objection and strike the answer.

Q. (By Mr. Collins): When you had this meeting with the representatives of the American Federation of Labor, will you state where it was held, when it was held, and who was present? [1361]

Mr. Nicoson: That is objected to as assuming a fact not in evidence. He never testified he had a meeting with A. F. of L. representatives.

Trial Examiner Kent: This conversation you had about the 1st of February that you now testified to——

Q. (By Mr. Collins): Now, are you certain it

(Testimony of Wilbur G. Durant.)

was the 1st of February or could it have been one way or the other a little bit?

A. I am certain I was here the last week of January.

Q. You are certain you were here the last week of January?

A. I am certain I wasn't here any other time.

Q. It was sometime during the last week of January? A. That is right.

Q. Now, was there a meeting or just a conversation? A. It was a meeting.

Q. Where was this meeting held?

A. Your office.

Q. To the best of your knowledge who was present?

A. There were about 15 present, none of whom I knew, excepting you.

Q. The other 13 or approximately 13, what did they identify themselves as to you?

A. All unions.

Q. What did they say to you?

A. They satisfied me that—— [1362]

Mr. Nicoson: Just a minute.

Q. (By Mr. Collins): State what they said.

Mr. Nicoson: I also insist the witness state who said what.

The Witness: Each A.F.L. organizer, after introduction, I asked each if they had a contract drawn up. I then satisfied myself we had a very high percentage of A.F.L. men in the plant. They assured me we were also—you did, also,—and I be-

(Testimony of Wilbur G. Durant.)

lieve in that one meeting I signed all their contracts.

Q. (By Mr. Collins): Now, then, had you authorized me prior to that date to negotiate with the A.F.L.? A. Yes.

Q. Now, what means did you personally—don't say what I did—what did you personally do to satisfy yourself that the A.F.L. had a majority of the employees in the Pioneer Electric Company?

A. I talked to a number of the older men in the plant. I took their word for it.

Q. Did you look around to see if you saw any buttons out there? A. Yes.

Q. What did you see?

A. Well, I didn't see anything but A.F.L. buttons.

Q. That was in the last week of January you are referring [1363] to now?

A. That is right.

Q. Did you talk to any of the employees of the Pioneer Electric Company who had never been anything but employees of the Pioneer Electric Company, some of these older men you are talking about?

A. No, I talked to O'Keefe and Merritt employees.

Q. Did you look to see if any of your own employees—by that I mean employees of the Pioneer Electric Company—did you look to see if any of them had buttons on at this time? A. No.

Q. Didn't you look around to see if your own employees were A.F.L.?

(Testimony of Wilbur G. Durant.)

A. By that time we had relatively few employees, 12 or so, I would say. I don't believe any of those belonged to any union; that is, those that were remaining at that time.

Q. As a matter of fact, you weren't concerned with unions at all; is that the case?

A. That is right.

Q. Did you have any idea at that time that you were going to be in violation of any National Labor Relations Board rulings? A. No, sir.

Q. What was your reason for getting yourself into this [1364] Pioneer Electric Company and starting it up like this? A. Profit.

Q. You wanted to make money? A. Sure.

Q. Is that why you are in it now? A. Yes.

Q. Did you have any intention of circumventing any National Labor Relations Board election?

A. No, I did not.

Q. Did you have any intention of depriving the C.I.O. of their right to bargain for your employees?

A. No.

Q. Are you willing at this time to bargain with the C.I.O. if they win a National Labor Relations Board election? A. Yes.

Q. Are you willing, on behalf of the employees of the Pioneer Electric Company, to consent to an A.F.L. vs. C.I.O. election?

A. I am willing for an entirely new election; no more arguments.

Q. Do you have any favorites between these two, the A.F.L. or the C.I.O.? A. Personally, no.

(Testimony of Wilbur G. Durant.)

Q. Now, I believe there has been introduced in evidence here as one of the Board's exhibits—without getting right down [1365] to the number, Mr. Durant,—a letter between the O'Keefe and Merritt and the Pioneer Electric Company where Pioneer was willing to rebate to O'Keefe and Merritt 10 per cent of the profit. Are you familiar with this (Indicating)?

A. Without reading it I am familiar with it.

Q. Was Pioneer Electric Company renegotiated by the United States Government annually or semi-annually, or something of that sort?

A. Annually.

Q. Was the O'Keefe and Merritt renegotiated annually? A. Yes.

Q. These are the contracts that you as a chief engineer and the one who went out and got them actually are familiar with them; is that right?

A. Right.

Q. Why did O'Keefe and Merritt insist that Pioneer give them back all the money over 10 per cent? Why didn't they let Pioneer keep all that money?

A. As a prime contractor we had to draw a reasonably tight arrangement with any company as we could, that was similar to any others.

Q. Did O'Keefe and Merritt limit the profit of other sub-contractors not to exceed 10 per cent?

A. Yes, if we could.

Q. If you could get the material from them?

A. Yes.

(Testimony of Wilbur G. Durant.)

Q. Did a profit not to exceed 10 per cent of the total business run into a substantial amount of money?

A. Did the profit not to exceed 10 per cent?

Mr. Collins: Strike that.

Q. (By Mr. Collins): Did 10 per cent of the total business done by Pioneer run into a substantial amount of money?

A. It would be 10 per cent of $2,000,000.00 or $3,000,000.00, yes.

Q. So they get 10 per cent of $2,000,000.00 or $3,000,000.00 for their operation?

A. That is right.

Q. If you hadn't limited the margin to 10 per cent, what would the percentage of profit run into if you could estimate?

A. We would have had to work a flat price arrangement on a lot of parts we did not.

Q. In other words, the profits would have gone all out of reason?

A. Not necessarily, but we would have hardly shown evidence of good faith as a prime contractor without some limitation.

Q. As far as the government renegotiation is concerned? A. Yes.

Q. All these contracts I have offered as exhibits were scrutinized by the United States Government?

A. Yes.

Q. And all other government agencies, state and federal?

(Testimony of Wilbur G. Durant.)

A. Yes. The government lived with us for about four years.

Q. People from the Army and Navy?

A. They lived with us for about four years; they still are.

Q. Have any of these government agencies challenged the separation of the entities, that is, have any of the government agencies challenged the fact that Pioneer is one company and O'Keefe and Merritt is another?

A. No. They have ascertained they are different.

Q. They looked into those things?

A. Right.

Q. Does the Pioneer Electric Company have stove mounters working for it now? A. Yes.

Q. Did the O'Keefe and Merritt have any stove mounters working for them at any time since you have been connected with them?

A. As union stove mounters?

Q. No. Stove mounters. Have they built any stoves?

A. No, we haven't built any stoves since I have been connected with it.

Q. Did O'Keefe and Merritt Company have any Teamsters working for them on the 20th of November, 1945, or were they working for another concern? [1368]

Mr. Nicoson: Just a minute. Just a minute. That is not quite kosher.

Mr. Collins: Very well, I will reframe the question.

(Testimony of Wilbur G. Durant.)

Q. (By Mr. Collins): Do you know whether or not O'Keefe and Merritt had any teamsters working for them on November 20th? A. No.

Q. You don't know? A. No.

Q. Does the Pioneer Electric Company have any generator business at the present time?

A. Yes.

Q. Who are you selling?

A. Where are we?

Q. Yes. Who do you sell to generally?

A. Dealers and distributors and exporters and the government.

Q. At the time you had this meeting in my office wherein the A. F. of L. representatives were present that you have discussed with me, did you testify as to the methods of proof they showed you all you can now remember?

Mr. Nicoson: I object to that as leading. I think it is quite unfair.

Q. (By Mr. Collins): Getting back to the meeting with the various A.F.L. representatives in my office on or about the last week of January, 1946, will you relate what proof, if [1369] any, that the various A.F.L. locals presented to you they represented the majority of the contemplated employees of the Pioneer Electric Company?

Mr. Nicoson: Object to that on the ground it is an attempt to impeach his own witness. He said he went out——

Mr. Garrett: He testified the evidence was presented. He hasn't testified yet——

(Testimony of Wilbur G. Durant.)

Trial Examiner Kent: As I recall the witness' testimony, in substance, he accepted their statements based as opinion partly on the fact he saw quite a number of A.F.L. buttons worn throughout the plant. Those were about the only buttons he saw.

Mr. Collins: He said he didn't see anything but A.F.L. buttons.

The Witness: That is right.

Mr. Nicoson: That is right. He said he talked to some of the older employees out there and took their word for it.

The Witness: That is right.

Mr. Garrett: He is not impeaching his own witness if he goes into detail.

Mr. Collins: I want to find out more about it.

Mr. Garrett: The statement is obviously not complete.

Trial Examiner Kent: I think probably the objection is well taken. I can't see any objection to your going further into it in your examination, Mr. Garrett. [1370]

Mr. Garrett: No. I think that is quite obvious. We get it on cross-examination and we get it here.

Mr. Collins: Very well.

Q. (By Mr. Collins): Mr. Durant, this contract that you signed with the American Federation of Labor, which is now one of the Board's exhibits in this case, will you tell us a little something about the wage rate paid? Is it a fair rate or did you make a sharp deal with the A.F.L.?

(Testimony of Wilbur G. Durant.)

Mr. Nicoson: That is objected to as calling for the conclusion of the witness; upon the further ground the exhibit speaks for itself, which is in evidence. Whether it is fair or not I think is immaterial.

Mr. Garrett: May I have the question?

Trial Examiner Kent: Reframe it, please.

Q. (By Mr. Collins): Do you know the going rate in the stove industry in the area?

A. No, but it would be patterned by Gaffers and Sattler, in my mind. [1371]

Q. Is the rate being paid now by O'Keefe and Merritt higher or lower than that being paid by Gaffers and Sattler? A. Higher.

Q. Are you able to estimate how much higher it is than Gaffers and Sattler?

A. I am able to, but not in my head.

Q. I see. You mean you would have to figure it out? A. Yes.

Q. Is it your understanding it is higher?

A. That is right.

Q. Did the representatives of the A.F.L. tell you what they were going to do to you if you didn't sign up a contract with them?

A. I didn't ask them; they didn't tell me.

Q. Do you know whether or not I had been having conferences with them for a matter of weeks or months prior to this meeting with you?

A. I know of a week.

Q. You know that much at least, a week?

A. Yes.

Mr. Collins: You may cross-examine.

(Testimony of Wilbur G. Durant.)

Mr. Garrett: I notice it is now about 11:00 o'clock. Will we take the morning recess this morning?

Trial Examiner Kent: We might take a recess for five minutes. [1372]

(A short recess was taken.)

Trial Examiner Kent: You may proceed.

Mr. Nicoson: Mr. Durant, let's go back.

Mr. Collins: I am not quite through.

Mr. Nicoson: I thought you were. I am sorry.

Q. (By Mr. Collins): I have about two questions here. Calling your attention to that meeting in my office, will you relate the conversations that were had and state who said this and who said that? The conversation I am now referring to is between yourself and myself and some 13 A.F.L. representatives present.

Mr. Garrett: Take a long breath before you start this answer.

The Witness: No, I couldn't take over a minute answering, because I wasn't there over five. I met them all and concurred with them that the majority of the plant was A.F.L.

Q. (By Mr. Collins): What evidence, if any, did they show you the majority was A.F.L.

A. They offered to show me. I didn't want to take the time to see it. I was satisfied.

Q. What did the offer to show you?

A. The enrollment of the A.F.L.

(Testimony of Wilbur G. Durant.)

Q. What did they have in their hands, if anything?

A. The enrollment, the numbers, the names; anything I wanted to see. [1373]

Q. Did I say anything in front of you to these representatives?

A. The same thing, you were satisfied that the plant was A.F.L.

Q. Did I say anything else in front of these A.F.L. representatives?

A. Nothing pertinent that I think of.

Q. Did I indicate what they were going to do to us if we didn't sign?

A. You or they implied we would be full of strike trouble sure.

Q. Was any mention made of any unfair list?

A. I know that—I don't recall there being any mention made of it.

Q. Do you recall anything in particular that Mr. McMurray of the Machinists said? Now, I know you don't remember Mr. McMurray by name. He is an elderly gentleman and has black, bushy eyebrows.

A. Mr. Collins, I don't recall anything any of them said.

Mr. Collins: You may cross-examine.

Cross-Examination

By Mr. Nicoson:

Q. At the time you met with the A.F.L. boys there in Mr. Collins' office, you knew there had been

(Testimony of Wilbur G. Durant.)

a Labor Board election in O'Keefe and Merritt; didn't you? A. Yes. [1374]

Mr. Garrett: Just a moment. Will you please speak up a little louder, Mr. Nicoson. I can't hear you. You talk low to the witness and he will respond to you.

Mr. Nicoson: I beg your most humble pardon, sir.

Mr. Garrett: If you shout at him maybe he will talk louder.

The Witness: I will talk louder.

Mr. Nicoson: When I start shouting people misconstrue my motive.

Q. (By Mr. Nicoson): You also knew that the C.I.O. had won that election; isn't that right?

A. Yes. The right to bargain, is that the election?

Q. Yes. A. All right.

Q. Now, let's go back to the time the Pioneer was set up. Did you have anything to do with the setting up of the Pioneer Electric Company?

A. In 1942?

Q. 1942. A. I set it up.

Q. You set it up? A. Right.

Q. Just how did you go about doing that?

A. We had about 10 or 15 subcontractors on primarily electrical work, such as winding and pregnating, and so on, [1375] none of whom were satisfactory on a contract for 2000 units.

We were awarded the contract for 12,000 units to be completed in the same time we were allowed for

(Testimony of Wilbur G. Durant.)

2,000 units. It couldn't be done by anybody in town. We had to set up ourselves to do it or we had to set up somebody to do it.

Q. Before Pioneer was set up, did you go to O'Keefe and suggest that something like this should be done? A. Yes.

Q. And I take it he agreed with you?

A. Yes.

Q. As to the actual formation of the Pioneer Electric Company, itself, as to who would become the partners, what was done or said about that?

A. That wasn't my concern. I didn't have anything to do with it.

Q. You just went to Mr. O'Keefe and you said you thought you ought to have some outfit to take care of this, to do it cheaper, and you left it up to him? Is that about the way it happened?

A. No. The contract was for $8,000,000.00. It was too big to be done by us. I wanted to do the whole thing ourselves in our plant, the O'Keefe and Merritt. We couldn't get anybody big enough to do it. The electrical end was about $3,000,000.00 so we organized a company for that.

Q. I am not referring particularly to that phase of it, Mr. [1376] Durant, but the establishment of the Pioneer Electric Company. After you had had your experience with these people on the outside, then didn't you go to Mr. O'Keefe and say, "If this was done under your supervision it could be done cheaper," and you thought better, with less cost for it and all that? A. That is right.

(Testimony of Wilbur G. Durant.)

Q. That is about what you said to Mr. O'Keefe?

A. Yes.

Q. Thereafter the Pioneer Electric Company was formed? A. That is right.

Q. Then the O'Keefe and Merritt turned over to them quite a bit of this stuff that was being done on the outside? A. Yes.

Q. Then it was your experience they were doing it cheaper and you continued that on throughout the war? A. Yes.

Q. And perhaps added to your original allotment to Pioneer as time went on; is that possible?

A. The primary requirement was not to meet schedule, as a war time schedule; absolutely necessary. It worked out to be cheaper in many other things, also. The primary requisite was the delivery schedule.

Q. Can you tell us why you didn't become a partner in the first instance? [1377]

A. I have forgotten what—the first instance required more money, but I didn't have it, anyway.

Q. Did you know that the Pioneer was reorganized in January of 1944? A. Yes.

Q. Did you attempt to become a partner at that time? A. No.

Q. It is your testimony, is it not, Pioneer Electric Company in and of itself is not going to be a sales concern?

A. Sales will, of course, be secondary; manufacture is primary.

Q. I mean directly to the open market.

A. We will have some sales to the open market.

(Testimony of Wilbur G. Durant.)

Q. Is it fair to say that the majority of your sales will not be directly from Pioneer to the open market, but through some other agency or concern?

A. It will be through some other concern, as they are with O'Keefe and Merritt now; that is the purpose of it.

Mr. Garrett: May I have the answer read?

(The answer was read.)

Q. (By Mr. Nicoson): So far as the gas ranges and wall furnaces and things of that nature are concerned, your only outlet from a sales standpoint will be O'Keefe and Merritt; isn't that the arrangement?

A. Our only outlet at present is O'Keefe and Merritt. It [1378] could be just as easily Sears and Roebuck, or anything else.

Mr. Garrett: May I have the answer, please?

(The answer was read.)

Q. (By Mr. Nicoson): At least for the present time you have no sales outlet contract with Sears and Roebuck or anyone else?

A. No. On domestic appliances.

Q. I am speaking now only of the gas ranges, floor furnaces and things of that nature.

Mr. Collins: I move that that—that the question just asked and the answer given in response was given in response to an ambiguous question. That is, you don't have any sales outlet for gas furnaces, ranges, and so forth. I think, in fairness to the

(Testimony of Wilbur G. Durant.)

witness, we ought to have included in there does he mean generators.

Mr. Nicoson: It was quite clear.

The Witness: No, I qualified it as—you are talking now only of household appliances.

Mr. Nicoson: That is correct. I qualified it by saying gas ranges and wall furnaces and floor furnaces and the like.

Q. (By Mr. Nicoson): In response to a question by Mr. Collins you mentioned some anticipated activities costing in the neighborhood of $400,000.00. Do you remember that portion of your testimony?

A. That is right. [1379]

Mr. Collins: Just a moment. That is objected to on the ground it is not proper cross-examination. It doesn't tend to prove or disprove anything at issue in this case. Upon the further ground it forces this witness to detail information which would be very useful to his business competitors, and one which would cause them severe financial loss if the exact disclosures were made at this time. I don't see the relevancy of the question, if the Board doesn't care to add weight to it, because this man doesn't want to go into exactly what the business deal is. I am willing to let it go at that. I am going to instruct this witness not to disclose that information unless he is forced to do so under a threat of contempt from this tribunal.

Mr. Nicoson: He opened the gate. I think under ordinary rules of cross-examination I have a right to go into it. I certainly don't have any desire to reveal trade secrets here.

(Testimony of Wilbur G. Durant.)

Mr. Collins: I can assure you it is a trade secret.

Trial Examiner Kent: I think the question may be generally asked.

Mr. Garrett: May we go off the record?

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record.

Mr. Nicoson: I will withdraw that question.

Q. (By Mr. Nicoson): Do you recall your testimony about the new activities, Mr. Durant?

A. Yes.

Q. Have those new activities gone beyond the blue print stage? By that I mean planning, and so forth.

A. No, they are in the planning stage.

Q. So that there is actually no production on those new activities at the present time?

A. Only production planning, that is all.

Q. I think you testified it would take about a year to develop that; is that your testimony?

A. No. It will take about a year to tool the plant of O'Keefe and Merritt, as we will, as Pioneer.

Q. It suffices to say those new activities are connected, or are they not connected with the manufacture of gas ranges and gas appliances?

A. They are both that, and generators, yes.

Q. Both that and generators.

A. The planning is both domestic appliances and generators. We are in two complete businesses, and we will always be in it.

(Testimony of Wilbur G. Durant.)

Q. I think off the record you suggested it was in the nature of expansion. A. Yes.

Mr. Garrett: May I have the answer read?

The Witness: Domestic appliances and generators. [1381]

Mr. Garrett: Domestic appliances and what?

The Witness: Generator sets.

Q. (By Mr. Nicoson): You recall shortly after V-J Day the government, or the army, cancelled or terminated your contract: isn't that right? [1382]

A. Most of them, yes.

Q. They were cancelled on or about August 17th, isn't that correct?

A. About 70 per cent were cancelled on or about that date, and the remainder were cancelled within a month. Not all the remainder, but the bulk of them were cancelled within about a month.

Q. It is also true that when those cancellations were made on August 17th, as you say, about 70 per cent, there was an appreciable deduction in Pioneer Electric Company employment? A. Right.

Q. How many employees would you estimate Pioneer had on or about November 20th? That is the date of the election.

A. Purely from estimate, about 15.

Q. About 15. How many of those were engaged in production?

A. About 15 production employees. I am not counting office in that case.

Q. About 15 production. And it is a fair summation of your testimony that number remained

(Testimony of Wilbur G. Durant.)

pretty constant up until Pioneer took over the O'Keefe and Merritt? A. Yes.

Trial Examiner Kent: I wonder if the record isn't a little ambiguous. Took over O'Keefe and Merritt. They really took over some of the production functions, rather than the business. [1383]

Mr. Nicoson: That is what I had reference to.

Trial Examiner Kent: That is what I thought.

Mr. Nicoson: I think the witness so understood me.

Q. (By Mr. Nicoson): Isn't that correct, sir?

A. That is correct.

Mr. Nicoson: I make no contention here that there isn't an O'Keefe and Merritt Corporation. They do exist for questions of sales and service.

Trial Examiner Kent: Yes.

Mr. Collins: And construction, too, there is no issue about that.

Mr. Nicoson: No, not so far as I am concerned.

Q. (By Mr. Nicoson): When you went up to Mr. Collins' office when you met the A.F.L. men up there, you say you were only there about five minutes. A. Yes.

Q. Showing you what is in the record as Board's Exhibit 26, which purports to be a copy of the agreement between the Pioneer Electric Company and the various A.F.L. organizations, did you look over the contract at all at that time? A. Yes.

Q. Is that substantially the same form as it was when you signed it?

Mr. Collins: I will stipulate it is. If that is the Board's A.F.of L. contract. [1384]

(Testimony of Wilbur G. Durant.)

Mr. Nicoson: That is right.

The Witness: I think so.

Q. (By Mr. Nicoson): With the exception that appended to it there were classifications with rates, which don't happen to be on this document, classifications and rates of pay and so forth were there.

A. That is right.

Q. Now, is it your testimony, sir, that this meeting with Mr. Collins took place in the latter part of January, or did it take place on the date that that Board's 26 indicates?

A. What date is on this?

Q. The document you have before you shows a date of consummation of January 2, 1946. Is that the date on which you signed it?

A. I would only be sure whether I was here or not. I don't know whether I was here; I could have been. I am not sure whether it was that date or sometime in this week of the latter part of January.

Q. What is your best——

Mr. Garrett: May I have that answer, please?

The Witness: I am not sure whether it was that date or the latter part of January. I was here both the fore part and the latter part of January.

Q. (By Mr. Nicoson): You have consulted a little book, isn't that correct, Mr. Durant, and I believe you stated [1385] that you were here on January 2nd. Isn't that what you testified?

A. Yes.

Q. That little book is a sort of a diary?

(Testimony of Wilbur G. Durant.)

A. No, I keep track of when I left and when I came home, so I don't say I was here when I wasn't in town.

Q. What is your best recollection that that document, Board's Exhibit 26 in front of you, was signed, on the 2nd of January or not?

A. I don't have a recollection of that time.

Q. You think that is approximately correct?

A. Well, January is, I am quite sure, the month. It wasn't before that time, so it must have been either the first week of January or the last, was all I was here. It doesn't have a signing date, apparently.

Q. You were here on February 1st; were you not? A. Yes; right.

Q. That is the date Mr. O'Keefe made the speech and introduced you to the men?

A. That is right.

Q. Had you at that time signed the contract with the A.F.L.? A. Yes.

Mr. Collins: May we go off the record a moment?

Trial Examiner Kent: Off the record. [1386]

(Discussion off the record.)

Trial Examiner Kent: On the record.

Mr. Nicoson: I will stipulate with counsel that the contract was signed by Mr. Durant the last week of January, 1946.

Mr. Collins: I think it was the last day of January.

Mr. Nicoson: The last day of January, 1946.

Mr. Collins: Dated back to January 2nd, for the

(Testimony of Wilbur G. Durant.)

purpose of giving retroactive pay to the employees from the beginning of negotiations.

Trial Examiner Kent: The record may so show.

Mr. Tyre: That latter statement isn't part of the stipulation?

Mr. Collins: There is no stipulation if it isn't.

Mr. Tyre: There certainly can't be any stipulation about what was in the minds of somebody else, why it was signed, and dated back.

Trial Examiner Kent: What is your stipulation then?

Mr. Collins: I offer to stipulate at this time the contract was signed on the 28th of January and it was dated January 2nd to give the retroactive pay effect; that was the purpose of it. If we can't stipulate all of it, I can't stipulate any of it.

Trial Examiner Kent: On the 28th?

Mr. Collins: 28th of January, or the last working day of January. [1387]

Trial Examiner Kent: The last working day?

Mr. Collins: The last working day.

Trial Examiner Kent: Well, the 31st is Thursday. The 28th of January is Monday.

Mr. Collins: It must have been the 31st then; 31st of January.

Mr. Garrett: The 31st of January would have been a Thursday.

Trial Examiner Kent: Yes.

Mr. Collins: That is when it was signed, because the Pioneer Electric Company was going to take

(Testimony of Wilbur G. Durant.)

over on the 1st of February. Because it wasn't a working day they didn't take over until the 4th.

The Witness: That is right.

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record.

Mr. Nicoson: I can't stipulate, but I will ask the witness this:

Q. (By Mr. Nicoson): During the off the record discussion then you have further consulted your little black book. Are you now able to state on what date you signed the A.F.L. contract?

A. Thursday, January 31st. [1388]

Q. In response to Mr. Collins' question about stove mounters, that you didn't have any, what period of time were you talking about when you said they didn't have any stove mounters?

A. During the war. [1389]

Q. During the war. When did they first put any stove mounters on, either O'Keefe & Merritt or Pioneer Electric?

A. About—within the last 30 days.

Q. Within the last 30 days. In any event, it was after the Pioneer took over the manufacturing process? A. Yes.

Mr. Nicoson: No further questions.

Q. (By Mr. Garrett): How long were you associated with the Frazier-Wright Company, Mr. Durant?

A. 1930 till '35. 1939 till 1940.

(Testimony of Wilbur G. Durant.)

Q. In the first period did that company have any relations with O'Keefe & Merritt, that is, in the period from 1930 to 1935? A. No.

Q. How about the second period, 1939 to 1940?

A. 1941, that should have been. They did have for about two months in 1941 and about one month of 1942, the first month of 1942.

Q. Were they an engineering firm or were they producing anything?

A. No, they were both an automotive parts company and an industrial engine company.

Q. When you were with Frazier-Wright, what was your position with them?

A. Chief engineer. [1390]

Q. Did you have anything to do with production?

A. Yes.

Q. Did you have anything to do with labor problems? A. Yes.

Q. What was your interest in the Frazier-Wright Company, were you a partner?

A. No; employee.

Q. Have you ever held any position prior to coming with O'Keefe & Merritt that gave you any experience in labor problems? A. Yes.

Q. Where?

A. At the Lycoming Manufacturing Company; '35 till '39.

Q. Where are they?

A. Williamsport, Pennsylvania.

Q. Do they make motors? A. Right.

Q. Do they have a labor contract? A. Yes.

(Testimony of Wilbur G. Durant.)

Q. What did you have to do with it?

A. As part of the management we joined the C.I.O. in 15 minutes one night; 2,500 men.

Mr. Nicoson: What was that?

The Witness: As part of management's decision, as to whether to join any union, we joined the C.I.O. in one night as an automotive industry.

Q. (By Mr. Garrett): You were involved in that decision, were you? A. Yes, sir.

Q. Were these generators that were made by Pioneer Electric sold as generator units or were they sold as part of a different and larger unit?

A. Pioneer Electric Company did not build generators. They built parts of the generator only. The electrical parts of the generator, and other parts of the generator set.

Q. What did you do with the generators you had in work at the time the war orders were cancelled?

A. The parts in process, or the generators in process? Most of them we built up completely and delivered to the government, even after cancellation.

Q. That was different from what you had been doing before cancellation? A. Yes.

Q. Well, had you been building them up completely before cancellation?

A. Are you speaking now of Pioneer Electric or O'Keefe & Merritt?

Q. Yes, Pioneer Electric.

A. Pioneer Electric Company did exactly as they had done before, which was still building a part of the generator.

(Testimony of Wilbur G. Durant.)

Q. Did O'Keefe & Merritt deliver these generators as generator [1392] units or parts of some other larger——

A. No, as generator units. O'Keefe & Merritt was always the prime contractor to the government.

Q. Did you know when you were working for Frazier-Wright, between 1930 and 1935, that the O'Keefe & Merritt Company had had labor trouble with the American Federation of Labor ?

A. No, I did not.

Q. When did you first learn that?

A. I never knew that. I knew they had labor trouble period.

Q. You didnt' know specifically when you went to work for O'Keefe & Merritt they were on the American Federation of Labor unfair list?

A. No, I did not.

Q. During wartime you had no physical evidence of labor trouble brought to your attention?

A. None.

Trial Examiner Kent: I would like to inject myself here just for a question or two. I notice your testimony was that you made parts for the generators. I assume, from some of the testimony here, that you probably wound the armatures and filled coils. How about the frames, did the foundry of O'Keefe & Merritt turn out the frames?

The Witness: Yes. Pioneer Electric Company built what might be termed only the electrical end of it. If we built an instrument panel, O'Keefe & Merritt stamped out the panel. [1393] Pioneer Elec-

(Testimony of Wilbur G. Durant.)

tric cut all the wires and mounted all the instruments, and that type of electrical work. On the generator itself they did the electrical winding and the electrical steel work, and that is all.

Trial Examiner Kent: How about the frames, were they turned out in the foundry of O'Keefe & Merritt?

The Witness: They were all turned out by O'Keefe & Merritt Company. Pioneer did that work for other than O'Keefe & Merritt, however. Pioneer sub-contracted to O'Keefe & Merritt primarily; also sub-contracted to a number of other companies.

Mr. Garrett: Do you have any further questions, Mr. Trial Examiner?

Trial Examiner Kent: That is all I had. I thought there was a little gap in there, and probably as much as anything else to clarify my own mind.

Q. (By Mr. Garrett): I take it the Frazier-Wright Company didn't have any labor contracts while you were with them?

A. Not while I was with them, no.

Q. Are they a local concern here? A. Yes.

Q. When did you first find out about the O'Keefe & Merritt Company being on the A.F.L. unfair list?

A. About—when you told me five minutes ago.

Q. I take it then you never had any discussions with Mr. [1394] Collins in which you received that information?

(Testimony of Wilbur G. Durant.)

A. As O'Keefe & Merritt being on the unfair list?

Q. Yes. A. No.

Q. Well, maybe I am using a term which is a little too narrow. I want to be sure you understand be. Unfair list is a sort of a technical term.

A. You asked me——

Q. Would your answer be any different if I asked you when you first learned that O'Keefe & Merritt was subject to an existing A.F.L. boycott, which had been unoperative during the war, but which might be expected to become operative again after the conclusion of the war?

A. I didn't think of it as being an operation. I knew it would be in operation in this last week of January.

Q. But now we are speaking about boycotts, rather than unfair lists.

A. Boycott on the sale of our equipment.

Q. But even in the last week of January, I take it, you didn't learn that there had been operative such a boycott long before you came——

A. No.

Q. ——with O'Keefe & Merritt?

A. That is right.

Q. So far as you knew it was something new when you heard [1395] about it the last week of January?

A. As far as I knew about it, it would be new if it went into effect.

Q. When you received that information did you

(Testimony of Wilbur G. Durant.)

receive information which gave you the fact the boycott, while new at the time, had any connection with any previously existing boycott?

A. No, I didn't connect it with any previously existing boycott.

Q. You talked from time to time, I take it, during your employment by O'Keefe & Merritt with Mr. D. P. O'Keefe about your prospects in the business? A. Yes.

Q. And in those conversations he never mentioned this A.F.L. boycott; did he?

A. No. He mentioned some labor trouble, but not a specific instance of it.

Q. You knew that the plant was being operated non-union during——

A. Quite; all my connection with the plant was non-union.

Q. Did you assume that the plant was being operated non-union because no union had ever made any attempt to organize it?

A. No. I knew that a union had made an attempt to organize it. [1396]

Q. You knew probably as a result of your discussions with Mr. D. P. O'Keefe that there had been a long strike?

A. That there had been what?

Q. Did you know there had been a long strike previous to the war? A. No.

Q. What advance notice did you have that an A.F.L. contract was to be presented prior to the day that you signed it?

(Testimony of Wilbur G. Durant.)

Mr. Tyre: Object to that. It assumes a fact not in evidence.

Mr. Garrett: That is correct.

Q. (By Mr. Garrett): Did you have any advance notice prior to the date of signing that an A. F. of L. contract was to be presented?

A. Yes.

Q. When did you receive that information?

A. The latter part of January.

Q. Were you there at the plant at the time the election was held in November? A. Yes.

Q. From whom did you receive your information about the A.F.L. contract in the latter part of January?

A. I told Mr. Collins to take the matter up, the matter of A.F.L. up with their representatives in January, the latter part of January. And I talked to him a number of times during [1397] that last week of January and had him get the contracts drawn up.

Q. When you signed the contract, can you recall whether there were any other signatures on it, or did you sign it first?

A. I don't recall whether there were other signatures on it or not.

Q. Can you recall that it had wage schedules attached to it?

A. I don't remember, but I don't think it did. I think they were separate, is what I mean. I don't believe they were attached to it.

Q. But the wage schedules were there; were they not? A. Yes.

(Testimony of Wilbur G. Durant.)

Q. Can you recall whether or not they covered substantially all the production employees in the plant? A. They did.

Q. By that, did every classification, every payroll classification in the plant on the production side have a wage attached to it?

A. Right, they did.

Q. Hourly wage? A. Yes.

Q. When you left the city on February 1st, how long were you gone?

A. I left on February 3rd and came home about the 23rd. [1398]

Q. In the meeting at which you signed the contract were you introduced individually to the representatives of the various A.F.L. unions?

A. Yes.

Q. Who by? A. Mr. Collins.

Q. Do you receive a salary from the partnership? A. No.

Trial Examiner Kent: I suppose, in view of that answer, the profits are distributed prorata among the parties according to the——

The Witness: Yes.

Mr. Nicoson: The distribution is all provided for in the Articles of Co-Partnership.

Mr. Garrett: I notice the hour of 12:00 o'clock has arrived.

Mr. Collins: Mr. Garrett, and Mr. Trial Examiner, this witness has to attend some very important meeting at 2:00 o'clock this afternoon. It is going to take him at least an hour. It is worth a lot of money to him.

(Testimony of Wilbur G. Durant.)

Trial Examiner Kent: We might, in the interim, substitute other witnesses.

Mr. Collins: Will there be any lengthy cross-examination?

Mr. Garrett: I don't think so. Mr. Collins will be notified if there is to be further cross-examination. I don't [1399] know about the C.I.O. of course.

Mr. Collins: I want to ask him one question, and I am through with him.

Trial Examiner Kent: You might ask that. We might be able to dispense with him then.

Mr. Garrett: I think I am pretty nearly finished. Do you have any cross?

Mr. Tyre: No.

Mr. Garrett: Let's release him, and recall him.

Mr. Nicoson: Why can't we get rid of him?

Mr. Garrett: I have a conference arranged here with people waiting for me in the outer office.

Mr. Collins: I am going to ask one question.

Is Pioneer making a complete generator now?

The Witness: Yes.

Mr. Collins: In dollars, how many do you contemplate making this year?

The Witness: About $1,000,000.00.

Mr. Collins: Generators?

The Witness: Yes.

Mr. Collins: That is different than anything O'Keefe & Merritt did?

The Witness: Right.

Trial Examiner Kent: You might give a general

(Testimony of Wilbur G. Durant.)

description as to the way that generator was handled. As I understand [1400] it, now, the frames were turned out in the foundry of O'Keefe & Merritt. You installed the electrical wiring in the generator, and I assume that the Pioneer also tested the generator after it was built up; did it not?

The Witness: No, they did not.

Trial Examiner Kent: Where was that done?

The Witness: We all differ in one word, the use of the word "generator." The O'Keefe & Merritt built not generators, but generator sets during the war. Pioneer builds them now, and generator sets. During the war Pioneer only built a part of the generator, which, in turn, is a part of the generator set.

Mr. Collins: The Pioneer had nothing to do with the gas ranges?

The Witness: No.

Mr. Collins: They had nothing to do with nine-tenths of it, they——

Trial Examiner Kent: They assembled them?

The Witness: Assembled and tested, and everything in the O'Keefe & Merritt.

Mr. Collins: Now, the entire ten-tenths is being done by the Pioneer Electric Company?

The Witness: That is right.

Mr. Collins: Where heretofore they only did one-tenth?

The Witness: That is right. [1401]

Trial Examiner Kent: We will adjourn until 2:00 o'clock.

(Testimony of Wilbur G. Durant.)

Mr. Nicoson: I have one more question I would like to ask.

Q. (By Mr. Nicoson): I would like you to state, as best you can, Mr. Durant, what volume of business will be done over a year's period for the gas ranges and wall furnaces, and such that you are now manufacturing for O'Keefe & Merritt, the same as you estimated the output of the generators. Will you do that, in round figures?

A. You mean what will be the ratio——

Q. No, what will be the dollar value, approximately, of those products you manufacture for O'Keefe & Merritt?

Mr. Collins: That is objected to on the ground it calls for a conclusion of the witness. He is not quite qualified to give it. The evidence shows that the Pioneer Electric Company makes generators and sells generators. He therefore knows the dollar volume of the generators. The evidence also shows that he now makes gas ranges for O'Keefe & Merritt at a price of two and a half per cent of his cost. He doesn't know the dollar volume of those gas ranges. He doesn't know what they are going to be sold for.

Mr. Nicoson: We might let the witness testify. We are letting Mr. Collins talk about an unknown quantity out here which I didn't even go into, about what he was going to make; We talked about the size of that. The witness has testified [1402] about how much he thinks the generators are going to be. All I want him to say is what he thinks how much the product he is going to sell——

(Testimony of Wilbur G. Durant.)

Mr. Reed: I think production hours would be better.

The Witness: I couldn't answer you. I know the generators exactly. I wouldn't miss it by $10,000.00 on a million.

Mr. Reed: I have about three or four questions.

Mr. Collins: As far as I am concerned, it is all right.

Trial Examiner Kent: I think it would be fair to the witness if we could excuse him now.

Mr. Collins: Let's get it over with.

Q. (By Mr. Reed): In your testimony where you made the statement that in a period of about 15 minutes the company that you were formerly working for decided to join up with the C.I.O.,——

A. That is right.

Q. ——do you mean by that testimony you decided to sign a contract with the C.I.O.?

A. That is right.

Mr. Tyre: Just a minute. I move that answer be stricken. It is completely irrelevant and immaterial to this proceeding. I move that answer be stricken for the purpose of making the objection to the question.

Mr. Reed: Mr. Examiner, I think his testimony was a little ambiguous there, and I am merely trying to straighten it out. [1403]

Mr. Tyre: I don't care how ambiguous it is. It has nothing to do with the issues in this case. I don't want to go into the details of it because it is obviously immaterial.

(Testimony of Wilbur G. Durant.)

Mr. Reed: I wonder why he didn't object to the original question and answer, if he thinks it is so immaterial.

Trial Examiner Kent: I think the question is proper. You may answer.

Mr. Collins: He has answered, I think.

(The record was read.)

Q. (By Mr. Reed): Where, before the war, at the time your electric company was operating in the capacity of a sub contractor, a new position of that company will be to operate in the capacity of a prime contractor and full contracting agency; is that correct?

A. You said before the war?

Q. I mean during the war.

A. During the war Pioneer Electric Company was a sub-contractor.

Q. Whereas after the signing of this lease Pioneer Company became a prime contractor?

A. Well, the word "sub-contractor" is right so far as the government is concerned. Since the war, since we are not only contracting for the government, we would be like any other company, a prime contractor.

Q. At the time of signing this contract with the A.F.L., you [1404] knew that you were taking over the manufacture of household appliances for O'Keefe & Merritt Company; is that correct?

A. Yes.

Q. You knew you were going to start with the Pioneer Company, which you represented, and were

(Testimony of Wilbur G. Durant.)

going to start in that capacity on February 4th; is that correct? A. That is right, I did.

Q. Therefore, you knew at that time that these various classifications and rates of pay previously referred to in the testimony as being a part of the contract that you signed were going to be necessary embodiments within a contract for proper operation of the Pioneer Electric Company; is that correct?

A. I did; that is correct.

Mr. Reed: That is all I have.

Trial Examiner Kent: We will adjourn until 2:00 o'clock.

Mr. Nicoson: Just a minute. I have just two or three questions.

Q. (By Mr. Nicoson): When you were with Lycoming, were you employed in any capacity like an officer or supervisor for Lycoming, when this thing occurred that you were telling us about?

A. I was in charge of the plant.

Q. You were in charge of the plant. Isn't it a fact, Mr. Durant, that charges had been filed with the Board in perhaps [1405] the Philadelphia Region, alleging Lycoming had a company-dominated union there?

A. We were virtually non-union.

Q. Weren't the charges filed saying that Lycoming had a company-dominated union and you made some settlement with the National Labor Relations Board and the charging union; isn't that right?

A. As I recall it, we just simply had the option—there was no union, no other union involved at all.

(Testimony of Wilbur G. Durant.)

It was a matter of whether we stayed non-union or company union or went C.I.O.

Q. Weren't there some charges pending N.L.R.B. charges pending against you at that time?

A. I don't think so. That time, by the way, was 1937 or '38; about 1937 or '38.

Q. 1937 or 1938? A. Yes.

Q. (By Mr. Reed): Had you been informed by your attorney or any other of your staff prior to the signing of the A.F.L. contract or at the time of the signing of the A.F.L. contract that the C.I.O. had made any claim of representation concerning your employees of the Pioneer Electric Company?

A. I was aware of the fact that the C.I.O. that not made any attempts to discuss anything with the Pioneer Electric Company.

Q. Who informed you of that? [1406]

A. I would know—they would have to discuss it with me. Unless they did discuss it with someone else; at least, they did not discuss it with me.

Q. Did anyone of your staff or attorney inform you that it had been made known to the C.I.O. that the Pioneer Electric Company were taking over the manufacturing of the household appliances for O'Keefe & Merritt?

A. Yes. I think Mr. Collins advised the C.I.O. that the Pioneer were taking over or at least told me he had advised the C.I.O.

Mr. Nicoson: I move to strike the answer as not responsive. It is hearsay, and he had no knowledge of it.

(Testimony of Wilbur G. Durant.)

Q. (By Mr. Reed): Did Mr. Collins——

Mr. Tyre: Just a minute.

Mr. Nicoson: Just a minute.

Trial Examiner Kent: The objection is sustained. It may be stricken.

Mr. Reed: I will rephrase the question.

Q. (By Mr. Reed): Did Mr. Collins inform you that no claim had been made upon him by the C.I.O. to represent the employees of the Pioneer Electric Company?

Mr. Nicoson: Same objection. This calls for hearsay.

Trial Examiner Kent: Objection sustained.

Q. (By Mr. Reed): In the meeting that you had with Mr. Collins, and A.F.L. representatives, did Mr. Collins say anything [1407] to you relative to representation by the C.I.O.?

Mr. Nicoson: Same objection.

Q. (By Mr. Reed): For the employees of the Pioneer Electric Company ?

Trial Examiner Kent: Read the question.

(The question was read.)

The Witness: No.

Q. (By Mr. Reed): Did Mr. Collins inform you at that meeting that he had informed the C.I.O. representatives that Pioneer Electric Company was taking over the manufacture of those products from O'Keefe & Merritt?

A. Not at that meeting.

Q. Did you at a prior time——

Mr. Tyre: Objected to.

(Testimony of Wilbur G. Durant.)

The Witness: Am I to answer above his objection?

Trial Examiner Kent: You may answer.

The Witness: Yes. During the week.

Mr. Reed: That is all.

Q. (By Mr. Nicoson): Mr. Collins also told you that at or about that time he was dealing or attempting to deal with the C.I.O. relative to these employees of O'Keefe & Merritt? A. Yes.

Mr. Nicoson: That is all.

Mr. Collins: Just a moment. What do you mean by "these employees"? Do you mean the employees of the Pioneer Electric [1408] Company or the employees of the O'Keefe & Merritt?

The Witness: I knew during that week you were dealing with the C.I.O. for employees of anybody, and the A.F.L., for the employees of anybody. You didn't talk anything else for a week but labor.

Mr. Collins: Do you know whether I was trying to sign up a contract for the employees of the O'Keefe & Merritt Company with the C.I.O.?

The Witness: Yes.

Mr. Collins: You know that?

The Witness: Yes.

Mr. Collins: I think there is an ambiguity of your testimony. I am trying to get it straightened out. Do you know whether I was trying to sign up a contract with the A.F.L. for the employees of the Pioneer?

The Witness: Yes.

Mr. Collins: Didn't I tell you nobody had asked

(Testimony of Wilbur G. Durant.)

me to sign up for the C.I.O. with the employees of the Pioneer?

The Witness: Yes.

Mr. Collins: Didn't I tell you that, as a matter of fact, at this A.F.L. meeting in front of the 15 people?

The Witness: I wouldn't be sure of that meeting. Within an hour of that time. It was all in that few days I was here.

Mr. Collins: That is all.

(Witness excused.) [1409]

Trial Examiner Kent: We will adjourn until 2:15.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 2:15 o'clock p.m.) [1410]

After Recess

(The hearing was reconvened at 2:20 o'clock p.m.)

Trial Examiner Kent: You might proceed.

Mr. Collins: I will call Robert White.

ROBERT WHITE

called as a witness by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Collins:

Q. State your name.

A. Robert White.

(Testimony of Robert White.)

Q. Mr. White, what was your capacity with the O'Keefe and Merritt Company during the war?

A. Shipping supervisor.

Q. How many people did you have working under you during the war?

A. Well, that was part of that—I had one actually working under me.

Q. I see. Then after the war was over, how many did you have working under you?

A. Well, I had the same amount actually.

Q. What do you mean the same amount?

A. I just had the same one person.

Q. One fellow. Now, who did the truck drivers work for during the war, and after the war? [1411]

A. Well, they worked under Service Incorporated.

Q. Did you have the authority to hire or fire any of those truck drivers?

A. No, I wouldn't say so.

Q. Did you have the authority to hire or fire any of the employees of Service Incorporated?

A. No, I would say not.

Q. Approximately how many employees did Service Incorporated have?

A. 14 or 15, I would say, offhand.

Q. Who was it that on behalf of O'Keefe and Merritt Company determined what Service Incorporated was to haul; who laid out the work?

A. I laid out the work.

Q. Do I understand that if there was a generator or some parts to be delivered some place you put it on the dock?

A. That is right.

(Testimony of Robert White.)

Q. And then Service Incorporated men came there and picked up this and took it away?

A. That is right.

Q. Now, then, calling your attention to sometime in the month of November, did you have a conversation with Mr. Charles Spallino; November of 1945?

A. Conversation with him?

Q. With Charlie Spallino, yes. [1412]

A. Well, I wouldn't say any specific conversation with him, no.

Q. Well, have you talked to him on other occasions besides in the month of November, that you can remember?

A. Regarding myself, you mean?

Q. Regarding anything.

A. No, not in any particular capacity of any description, no.

Q. You have talked to him in the years both you have been working in the same plant together?

A. We naturally have, yes, sir.

Q. Do you recall any conversation with him concerning union activity? A. Definitely not.

Q. Do you recall Charlie Spallino coming to you and saying that he had been instructed to tell you to get the truck drivers together and meet a Mr. Blaney, I think, on the following morning? Do you recall such a conversation?

A. No, definitely not.

Q. Did you ever have such a conversation with him? A. No, sir.

Q. Did you ever tell the truck drivers to come

(Testimony of Robert White.)

together and meet with Mr. Blaney of the Teamsters? A. No, I would say not.

Mr. Collins: You may cross-examine. [1413]

Cross-Examination

By Mr. Nicoson:

Q. Did you ever tell the truck drivers to meet with anyone from the Teamsters' Union?

A. I didn't hear that question.

Mr. Nicoson: Read the question.

(The question was read.)

The Witness: No, sir.

Mr. Nicoson: That is all.

Mr. Garrett: I will waive cross-examination of this witness.

Mr. Collins: That is all.

(Witness excused.)

Mr. Collins: I will call Mr. McNinch. I understand Mr. Garrett hasn't cross-examined Mr. McNinch.

Trial Examiner Kent: That is right.

C. GUY McNINCH

a witness called by and on behalf of the respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Garrett:

Q. Do you know Mr. Levascos, Mr. McNinch?

A. Yes, sir.

(Testimony of C. Guy McNinch.)

Q. After the election did you ever serve on any committee with Mr. Levascos? A. No, sir.

Q. Was Mr. Charlie Spallino an observer at the same table you occupied at the election?

A. He was—no, sir, he was an A.F.L. representative.

Q. Did he tell you that? A. Yes, sir.

Q. That election was at 4:30 in the afternoon; was it not? A. It started at 4:30.

Q. When did you appear there at the place where the ballots were cast?

A. Right as near 4:30 as it could be. It might have been a minute before or after.

Q. Were you at a meeting of the Five and Over Club just prior to that date? A. Yes, sir.

Q. You talked to Charlie Spallino there?

A. Not at the meeting.

Q. What occurred at that meeting?

A. Well, Mr. Levascos—Mr. Spallino got up and made a speech. He thought everybody ought to vote for A.F.L.

Q. Tell us all you recall of that speech made by Mr. Spallino. That is Charlie Spallino, is it?

A. Yes.

Q. Anything else you remember he said?

A. Well, no; not definitely, no.

Q. At the time of that meeting did you know you were to be [1415] an observer in the election?

A. Yes, sir.

Q. Did you know that Spallino was to be one?

A. He was to represent the A.F.L.

(Testimony of C. Guy McNinch.)

Q. When did you learn that?

A. Oh, it was about three or four days; it was the week before.

Q. Who told you? A. Fred Rotter.

Q. Just what did Rotter tell you?

A. Asked me if I would serve as an observer at the election that was to be held by the Board.

Q. Did he tell you anything about Spallino?

A. Not with the exception he was to represent the A.F.L.

Q. Did you talk to Spallino about that?

A. Well, he came to me and told me that he was the A.F.L. representative, was all.

Q. Was that before the election?

A. Yes, sir.

Q. How long before? A. About an hour.

Q. Was anyone with him at that time?

A. Not that I remember of.

Q. Was that before or after the Five and Over Club meeting? A. That was before. [1416]

Q. Did he tell you who had designated him to represent the A.F.L. in the election?

A. No, sir.

Q. How do you know some of those challenged ballots were opened? A. I saw them opened.

Q. Who by?

A. The lady that—that conducted the election, was the only one that had access to handle them.

Mr. Tyre: I move that answer be stricken as not responsive.

Trial Examiner Kent: Read the question.

(The question was read.)

(Testimony of C. Guy McNinch.)

Trial Examiner Kent: I think it is generally responsive.

Mr. Garrett: I will ask a further question to clear it up.

Trial Examiner Kent: All right.

Q. (By Mr. Garrett): Are you just giving me your conclusion as to who opened them, or did you see her open them?

A. I saw her open them.

Q. What happened to them after they were opened, if you know?

A. She tore up the envelope and put the ballot away somewhere.

Q. Had you ever seen her before? [1417]

A. No, sir, not to my knowledge.

Mr. Garrett: I think it will be stipulated that was Mrs. Phoenix.

Mr. Nicoson: Oh, yes.

Mr. Garrett: So stipulated. That is all.

Mr. Collins: Is there anything further?

Mr. Nicoson: Just a minute.

Q. (By Mr. Nicoson): Now, what is your testimony about how many challenged ballots were opened? A. I couldn't say exactly.

Q. Well, was it more than one? Did you see more than one opened?

A. Yes, there was more than one, I know that.

Q. Do you know whether or not Mr. Rotter, Mrs. Phoenix—that is the lady's name—and some representative of the A.F.L. and C.I.O. had agreed to those envelopes being opened?

(Testimony of C. Guy McNinch.)

A. Well, Mr. Rotter didn't have anything to do with it. But she asked the two other men there, that I assumed were the representatives from both places, because they took down the tally. She asked them to take down the tally of the election.

Q. Do you recall those fellows' names? [1418]

A. Well, the one I found—come to be acquainted with afterwards was Mr. Roberts. But the other man I didn't know; C.I.O. man.

Q. Mr. Roberts was one of the men that he asked if it was all right to open the envelope; is that correct? A. That is right.

Q. And Mr. Roberts said O.K.; is that right?

A. Yes.

Q. Thereafter he did open the envelope; is that correct? A. Yes, sir.

Q. Tore up the envelope and he mixed that ballot with all the rest of them; didn't he?

A. I wouldn't say that he had any envelope he put this in separate. I didn't notice where he put them afterwards; they weren't thrown in the waste paper basket.

Q. I am talking about what happened with the ballot.

A. She put that somewheres too, the ballot.

Q. How do you know she counted them?

A. I didn't say she counted them.

Q. Wasn't it your testimony yesterday that ballot of this Mexican was counted?

A. I said I contested the ballots.

Q. That is correct.

(Testimony of C. Guy McNinch.)

A. And it was brought out and it was opened. After that I didn't—— [1419]

Q. You didn't testify——

A. I don't recollect I said the ballot was counted.

Q. What happened to it?

A. I just told you what happened to it.

Q. Is it your testimony now you can't say whether or not that ballot was counted?

A. That is right.

Q. Mr. McNinch, I show you a document which is in evidence as Board's Exhibit 11, and direct your attention to the second name written in under the words "For O'Keefe and Merritt." Is that your signature (indicating)? A. Yes, sir.

Mr. Nicoson: I have no further questions. Just a minute.

Q. (By Mr. Nicoson): At this Five and Over Club, immediately before the election, Mr. McNinch, was Johnny Levascos there? A. Yes.

Q. Did he make a little talk? A. Yes.

Q. What did he say?

A. I will have to think a bit. I can't remember just exactly what he said.

Q. Which one of them talked first?

A. Charlie Spallino. [1420]

Q. Charlie talked first?

A. Yes, sir; I remember that.

Q. Then he introduced Mr. Levascos, and then Johnny had something to say? A. Yes.

Q. Didn't Johnny have something to say about voting for the A. F. of L.?

(Testimony of C. Guy McNinch.)

A. I just don't remember. He spoke about coming back from the service and that they should do the right thing.

Q. That is right. And that he at one time had been a member of the A. F. of L. union?

A. That is right.

Q. And he was talking about the employees, what they should do in this election that was going to take place in just a few minutes; isn't that right?

A. I can't remember him ever saying they should vote one way or the other.

Q. He did mention the A. F. of L.?

A. That is right.

Q. He talked longer than Charlie; didn't he?

A. Well, that would be pretty hard to say because the time was getting short.

Q. Isn't it a fact that Johnny was the one that talked about voting for the A. F. of L., and not Charlie? You don't recall what Johnny had to say at this time. A. No. [1421]

Mr. Garrett: He already answered the question. He said no.

Mr. Nicoson: Will you read the last few questions and answers?

(The record was read.)

Q. (By Mr. Nicoson): Isn't it a fact that it was Johnny that spoke about voting for the A.F.L. and not Charlie? A. No, sir.

(Testimony of C. Guy McNinch.)

(The following portion of the record was read:

"Q. You don't recall what Johnny had to say at that time? A. No.")

Mr. Nicoson: I have no further questions.

Mr. Collins: May this witness be excused?

Mr. Garrett: Just a minute.

Did Mr. Levascos also mention the C.I.O., as well as the A.F.L.?

The Witness: I don't remember.

Mr. Garrett: That is all.

Q. (By Mr. Tyre): What did Charlie Spallino say at that meeting?

A. Well, I just told a little bit ago that I just didn't remember.

Q. You don't really remember what Charlie said; do you?

A. They were called together for the election, see. [1422]

Q. So far as you remember, Charlie said that you people were being called together for the election, is that as much as you remember of what Charlie said?

A. No, he didn't even say that. We were really called up there—the meeting was really called up there to tell us when we would get our turkeys for Christmas.

Q. That is what he told you? A. Yes.

Q. He also told you that there was going to be an election? A. Yes.

(Testimony of C. Guy McNinch.)

Q. That is all you remember that he said?

A. That is all I remember definitely that he said, now.

Mr. Tyre: That is all.

Mr. Reed: No questions.

Mr. Nicoson: No questions.

Trial Examiner Kent: You may be excused.

(Witness excused.)

Mr. Collins: I will call Mr. W. J. O'Keefe.

WILLIAM JOHN O'KEEFE

a witness called by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Collins:

Q. Mr. O'Keefe, will you state your full name for the record?

A. William John O'Keefe. [1423]

Q. Are you one of the partners of the Pioneer Electric Company? A. I am.

Q. How much money did you contribute to the capital of the organization when it started?

A. $15,000.00.

Q. Did you get that money from the O'Keefe and Merritt Company, or a part of your personal funds? A. Personal money.

Q. Do you have any other business ventures besides any stock you might have in the O'Keefe and

(Testimony of William John O'Keefe.)

Merritt Corporation and your partnership in Pioneer? A. Several.

Q. Do you have any other connections that are more important to you than your connection in Pioneer?

A. Yes; O'Keefe and Merritt Company.

Q. Are you engaged in any kind of an oil well drilling activity? A. I am.

Q. Do you have any interest in any foundry?

A. I own a half interest in the Overton Foundry.

Q. Do you have any interest in an engineering company of any kind?

A. I own a sole interest in Precision Manufacturing Company.

Q. Calling your attention to any time prior to January 20, [1424] 1946, did the O'Keefe and Merritt Company have any teamsters working for them, say, a period of three or four years? A. No.

Q. Who did the teamster work for then, the hauling of the products of the O'Keefe and Merritt Company?

A. All of the hauling done for O'Keefe and Merritt Company—I should say the majority of it, to my knowledge, was done by Service Incorporated.

Q. There were other companies that did some hauling for you? A. Yes.

Q. Pacific Freight Lines and pick-up drivers here and there?

A. I can remember the Pacific Freight Lines and Western Transportation. Two or three other outfits, I don't remember the names of them.

(Testimony of William John O'Keefe.)

Q. Now, did O'Keefe and Merritt have some service men, refrigeration and stove service men?

A. Domestic Service.

Q. Domestic Service?

A. Yes, they did.

Q. These service men drove trucks; did they not? A. That is true.

Q. They weren't hired to haul merchandise other than the parts for appliances to the homes? [1425]

A. We never hauled anything on our service trucks with the exception of small parts used for repair work on the appliances.

Q. Will you relate what changes, if any, have been taking place in the manufacturing of gas ranges in the O'Keefe and Merritt factory or the Pioneer Electric Company since February 1, 1946?

A. By changes, do you mean changes in the way that the stove was manufactured?

Q. Well, the changes in the way the stove was manufactured and any other changes you can think of as a result of being transferred to the Pioneer Electric.

A. I think I am answering this correctly. The stoves we are now making through the facilities of the Pioneer Electric Company are an entirely different basic design than the ones the O'Keefe and Merritt Company made the last time they were in the manufacturing of stoves.

Q. What is this basic change?

A. O'Keefe and Merritt Company made a stove which was assembled out of parts brought to an

(Testimony of William John O'Keefe.)

assembly line or a finish assembly line. Pioneer Electric is making a stove that is designed around a one-piece body construction; an entirely different method of doing it.

Q. Were there any other changes that Pioneer brought in?

A. They made some design changes, and they have made a[1426] number of changes in the actual operation of the—not the operation, but the fabrication of parts.

Q. Did the Pioneer Electric Company cease manufacturing any items that O'Keefe and Merritt was manufacturing after they took over the plant of O'Keefe and Merritt?

A. I don't believe I understand that, Mr. Collins.

Q. Did Pioneer quit making any of the items that O'Keefe and Merritt was making when they took over, Pioneer came in on the 1st of February? Was there anything that O'Keefe and Merritt was manufacturing that the manufacturing was stopped on when the Pioneer took over?

A. Nothing any further than the assembly of generators, which had been dropped by O'Keefe and Merritt Company prior to that time, anyway.

Q. Was there any change in outside jobs being done in the foundry? Were there any changes back there? A. Yes, there were. [1427]

Q. What were those changes?

A. Up to and including the time that Pioneer took over the majority of the foundry work was done on outside contracts.

Q. Such as what?

(Testimony of William John O'Keefe.)

A. During the war period probably 90 to 95 per cent of the foundry was taken up by outside work.

Q. Give us some examples of the type of outside work?

A. Mostly plumbing supplies.

Q. Now, the foundry being operated by Pioneer Electric makes plumbing supplies?

A. To the best of my knowledge Pioneer Electric is making nothing but stove parts and a few generator parts.

Q. If there was anything of that nature being made by them you would know about it; would you not? A. Yes, I would.

Q. Do you know anything about an A. F. of L. charter being granted to the employees of the O'Keefe and Merritt Company? A. I do.

Q. What do you know about that?

A. There was an A. F. of L. charter granted to the employees of the O'Keefe and Merritt Company somewhere around '36 or '37; 1936 or 1937.

Q. How do you know that? [1428]

A. To clutter up the record with more family the president happened to be married to my cousin. I found that out after he was president.

Q. Did he tell you that at work or at your house?

A. I knew he was president of the A. F. of L. local at our plant. I found it out when somebody in the family died and I met him at the wake.

Q. Did you ever hear of a C.I.O. charter or any C.I.O. members coming into the O'Keefe and Merritt Company? A. Not until very recently.

(Testimony of William John O'Keefe.)

Q. Did you ever hear of it before the election?

A. No.

Q. Do you know whether or not there were any A. F. of L. members employed by the Pioneer Electric Company prior to the election?

A. I don't know whether they were paid up members or not. I saw A. F. of L. buttons.

Q. On the employees of the Pioneer Electric Company? A. That is right.

Q. Did you see any A. F. of L. buttons on the employees of the Pioneer Electric Company after the election? A. I believe I did.

Q. Did you see any A. F. of L. buttons on the employees of the O'Keefe and Merritt Company after the election? A. I did. [1429]

Q. Did you see any C.I.O. buttons on the employees of the O'Keefe and Merritt Company prior to the 1st of February, 1946?

A. I wouldn't be able to set that date exactly, but I don't think so.

Q. Did you see any C.I.O. buttons on anyone except the witness Mr. Charles Spallino who testified in court? A. Since February 1st?

Q. Since February 1st, yes.

A. Yes, I think I have seen a few.

Q. Name the ones you have seen them on.

A. I am sorry, I didn't try to correlate the name and the button at the time.

Q. Were you able to estimate the number as to whether it was two or three or a hundred, or what it was?

(Testimony of William John O'Keefe.)

A. I imagine I have seen maybe a couple of dozen.

Q. A couple of dozen? A. Yes.

Q. How many A. F. of L. buttons would you estimate you had seen?

A. A couple of hundred.

Mr. Nicoson: Is this all around about February 1st?

Q. (By Mr. Collins): This couple of hundred buttons you have testified seeing on the employees of the O'Keefe and Merritt Company or the employees of the Pioneer Electric [1430] Company, over what period of time have you noticed that?

A. Which are you talking about now, Pioneer or O'Keefe and Merritt?

Q. Prior to February 1st they were employees of the O'Keefe and Merritt Company?

A. That is right.

Q. How many buttons would you estimate you saw on the employees of the O'Keefe and Merritt Company prior to the 1st of February?

A. Those are the figures I think.

Q. About a couple of hundred? A. Yes.

Q. Are they still wearing the buttons, about that ratio?

A. What time I have had out of this damned place I noticed about that same amount.

Q. Did any other Company besides the Pioneer Electric Company keep all or substantially all its personnel at work on products for the O'Keefe and

(Testimony of William John O'Keefe.)

Merritt Company during the period from the war up to the time of the termination of the war?

A. I know two or three companies that kept substantially all. I couldn't say whether it was the complete personnel or not.

Q. Would you name those companies?

A. The James Graham Manufacturing Company was probably [1431] 98 per cent on O'Keefe and Merritt work. The Drewitt Metal Products, I think, was about 75 or 80 per cent on our work.

The Wirshing Company, Wirshing Manufacturing Company was probably 75 per cent.

The Waldrip Welding Company was about 90 per cent.

The Reuland Electric Company was possibly 50 per cent.

There were others, but offhand I can't think of them.

Q. Do you know whether or not there was any profit limitation clauses in any of your contracts with these contractors that you have now testified to that have kept most of their employees working on O'Keefe and Merritt products?

A. Yes, there were.

Q. In any of these companies you have now mentioned were there any employees or officers or stockholders of O'Keefe and Merritt interested in a business way, if you know, in a financial way? In other words, any of the officers, employees or members of the board of directors of the O'Keefe and Merritt have any financial interest of any kind in

(Testimony of William John O'Keefe.)

these companies you have just been talking about?

A. Yes, they did.

Q. In which companies?

A. In Wirshing Company, Graham, Waldrip; some in Reuland, I believe.

Q. Do you know anything about how the Pioneer Electric [1432] Company originally started?

A. Yes, I think I do.

Q. Will you relate the method, if you can, of the origination of the Pioneer Electric Company in 1942? [1433]

A. We had at that time a contract for approximately $2,000,000.00, which was spread, the electrical end of which was spread to various contractors in town who were at that time, even at that time inadequate to supply the needs as they were laid out to us by the government contracts. Some method was necessary to facilitate that production.

As nearly as we could find, nobody in town was large enough or capable enough of taking care of the facility as we had to have it. So Mr. Boyle and Mr. Merritt put up their personal funds.

Q. Which Mr. Boyle?

A. Both Willis and Lewis Boyle.

Q. Both of the Boyles put up their personal funds?

A. Both of the Boyles put up their personal funds.

Q. How much funds did they put up?

A. I have no idea, but they were operating approximately a $3,000,000.00 a year business.

(Testimony of William John O'Keefe.)

Q. A substantial amount?

A. I would imagine it was. They put up their personal funds to operate this business and started it from there.

Q. Did O'Keefe & Merritt form it?

A. O'Keefe & Merritt had nothing to do with it.

Q. Do you know anything about what transpired, or the method of admitting Mr. Durant to the partnership of the Pioneer Electric Company, as well as yourself to the Pioneer Electric [1434] partnership? A. Yes.

Q. Will you relate how you fellows got into it?

A. At the termination of the war we had an inventory on hand at O'Keefe & Merritt Company, which was to be paid for by the government agencies to which they belonged.

Mr. Durant had the idea at that time that besides Pioneer Electric carrying on with manufacturing of our civilian products——

Q. Such as what?

A. Stoves, heaters, water heaters, and so forth; our standard line before the war,—that we acquire this government inventory by bidding to the government agencies for it, plus attempting to acquire from other sources throughout the country, who had been engaged in similar business, as much of it as possible, so we would continue in the generator business from a civilian standpoint in the future.

O'Keefe & Merritt wasn't interested in any way as a company in that particular type of enterprise. So Durant, myself, and some of the others around

(Testimony of William John O'Keefe.)

the place put up our personal monies to carry on this partnership.

Q. When, so far as you know, was it first contemplated that Pioneer Electric Company would manufacture the gas range?

A. Somewhere about two years ago.

Q. Have you ever discussed this matter with any of the people [1435] around the O'Keefe & Merritt Company, the fact that Pioneer was going to take over the manufacture of the gas ranges?

A. I have been so close to it and discussed it so often with various people I wouldn't be able to name anyone in particular. It has been common knowledge, I am sure.

Mr. Collins: Will you read the answer?

(The answer was read.)

Q. (By Mr. Collins): Common knowledge where?

A. I would say it was common knowledge around O'Keefe & Merritt and Pioneer.

Q. For how long a period of time?

A. Somewhere around a couple of years.

Q. Did I ever tell you that I advised Mr. Despol at my first meeting with him that Pioneer Electric would very likely take over the manufacture of gas ranges? A. Yes.

Mr. Tyre: I object to that. I think it is self-serving and certainly isn't binding on the C.I.O., as to what conversation took place between Mr. W. J. O'Keefe and Mr. Collins.

(Testimony of William John O'Keefe.)

Trial Examiner Kent: I can't see the materiality of that.

Mr. Collins: Mr. Trial Examiner, I submit it is very material to show. That goes to the very issue, to show that Pioneer Electric Company dealt in good faith with the A.F.L. when they signed the contract.

Mr. Despol was put on notice by myself that Pioneer was [1436] in contemplation of taking over this equipment, manufacture of it. The testimony of witnesses here, both as witnesses on the stand and stipulated testimony evidence, shows that no demand was made by Despol to bargain for the employees at the Pioneer Electric Company. Therebefore, this man, when he signs a contract with the A.F.L., is doing it after the C.I.O. has had ample notice. They didn't even go to the trouble to get the thing on the election when it was a matter of common knowledge the thing was going to be made by the Pioneer Electric Company.

Mr. Tyre: If Mr. Collins wants to put into evidence what his statement to Mr. Despol was, either Mr. Collins should take the witness stand or Mr. Despol, or someone who was present when the statement was made, whose statement will be binding on us. Mr. O'Keefe can't testify to a conversation between Mr. Despol and Mr. Collins when he wasn't present at it.

Mr. Collins: It goes to whether or not Mr. O'Keefe at Pioneer Electric Company dealt in good faith with the C.I.O. when they signed a contract

(Testimony of William John O'Keefe.)

with the A.F.L. I will submit that there is testimony, I think, of eight or nine witnesses who said that I mentioned that Pioneer Electric was going to take over the manufacture of the O'Keefe & Merritt gas range. And the testimony shows that Mr. Despol then said that he wouldn't take it lying down, or something like that; I don't just remember what his conversation was. [1437]

There is no evidence that Despol said, "I want to sign a contract with Pioneer Electric Company." Nowhere in the evidence is there anything like that.

Trial Examiner Kent: The answer may be taken.

The Witness: What was the question again, please?

(The question was read.)

Q. (By Mr. Collins): You may answer.

A. You did advise me you had a conversation with Despol in which you had told him that.

Q. Relate the conversation.

A. Between yourself and myself?

Mr. Tyre: Mr. Examiner, that is the very point. How could we possibly sit here and hope to rebut such testimony, when there wasn't anybody representing the C.I.O. or the Board, or even the A.F.L., for that matter, present at that conversation.

Trial Examiner Kent: I think the objection is well taken. The testimony is offered to prove——

Mr. Collins: I will withdraw the question.

Q. (By Mr. Collins): Did I tell you that Mr.

(Testimony of William John O'Keefe.)

Despol told me that he had gone to considerable organizing expense——

Mr. Tyre: Mr. Examiner, that is the very thing we have just objected to. I don't care whether he puts the statement in the witness' mouth or whether he asks the witness to state in his own language what was said at that conversation. In [1438] either case that sort of evidence is entirely inadmissible at this hearing or any other type of hearing.

Mr. Collins: May I finish my question?

Trial Examiner Kent: You may finish the question.

Q. (By Mr. Collins): Did I tell you at this first meeting with Mr. Despol that I had told him that Pioneer Electric Company was going to take over the manufacture of the O'Keefe & Merritt gas range, and did he not tell me that, among other things, the union had gone to considerable expense and wouldn't take it lying down——

Mr. Tyre: In addition——

Mr. Collins: Just a minute. I am not through with my question.

Q. (By Mr. Collins): Didn't I also tell you that I then said to him, "I will take it up with my clients and see if they will underwrite your organizing expense if you will keep this thing on a peaceful basis and take it to court, rather than taking it to a strike and having a heartbreaking strike around the plant"?

Mr. Tyre: Obviously this question is not only leading and suggestive, but it has been made in such

(Testimony of William John O'Keefe.)

a manner it is impossible to ask even if the other grounds for inadmissibility did not exist. I think the Examiner must at this time make a ruling that the question is inadmissible and the entire line is inadmissible. The error that counsel has now committed in [1439] asking such a leading and suggestive question is absolutely incurable.

Mr. Collins: During the time I cross-examined Mr. Johnny Despol I laid the foundation for this very question in an attempt to impeach his testimony.

I asked him point-blank didn't I say this and didn't I say that; the very question I am now propounding to this witness. Most of the things I am asking this witness Despol admitted he said.

Mr. Tyre: Your Honor, a self-serving declaration by one of the persons to the conversation isn't rebutting the evidence, unless the witness himself at that conversation gets on the stand and denies it. If Mr. Collins wants to deny it, let him get on the stand and under oath deny it.

Mr. Nicoson: I never heard of anything so preposterous in my life, that you can impeach the witness' testimony you laid the groundwork for by telling somebody else what you said.

Trial Examiner Kent: I will sustain the objection. [1440]

Mr. Collins: I make an offer of proof at this time that if this witness were permitted to answer he will testify there was such a conversation.

Mr. Garrett: Aside from the leading nature of

(Testimony of William John O'Keefe.)

the question, there is something germane and something that ties up with the Despol conversation in this, as being a report made by the attorney to his client, in accordance with the promise made to Mr. Despol that was testified to.

Mr. Collins: I submit it is highly material. I may decide to take the stand, although I am here without——

Mr. Garrett: I think it is leading.

Mr. Collins: I may decide to take the stand and so testify. In any event, this would be corrobration of my testimony, if I decide to do so.

Mr. Nicoson: You don't suggest, Mr. Garrett, that is a proper impeachment method?

Mr. Schullman: He refuses to answer on advice of counsel.

Mr. Garrett: I never thought it was proper until I saw you doing it on your direct of Spallino.

Mr. Nicoson: I don't object to what the attorney told his client. I certainly say it is certainly not a proper method of impeachment.

Mr. Collins: Very well. I will withdraw the question.

Q. (By Mr. Collins): What report did I make to you concerning my conference with Despol?

Mr. Nicoson: Now, your Honor, this is getting ridiculous. He has told him what he wants him to say, and now he wants him to tell him what was said.

Trial Examiner Kent: I will reserve my ruling and take it subject to motion to strike if Mr. Collins does not testify.

(Testimony of William John O'Keefe.)

Mr. Tyre: If Mr. Collins is going to testify he is the only competent witness who can possibly rebut what Mr. Despol has said. Mr. W. J. O'Keefe was not present at that conversation. How can we possibly cross-examine him on what was said at the conversation, unless he was there?

Mr. Garrett: O'Keefe is the man that knows what Collins told him.

Mr. Tyre: We can't cross-examine on conversations at which we were not present.

Your Honor, this question calls for a self-serving declaration by Mr. Collins, which is clearly inadmissible. It calls for hearsay testimony, it calls for a conclusion of the witness and calls for testimony supposedly—rather calls for conversation at which neither the C.I.O. nor the A.F.L. nor anybody else, except the respondent's own agents, were present. On those and probably a half dozen other grounds it is probably not necessary here to mention, this sort of testimony is entirely inadmissible and it will be ridiculous to allow it. [1442]

Mr. Collins: As I understand the Board made a ruling. Go ahead and answer.

Trial Examiner Kent: Off the record.

(Discussion off the record.)

Trial Examiner Kent: On the record. Read the question.

(The record was read.)

Trial Examiner Kent: I will let my original ruling stand and sustain the objection.

Mr. Collins: I would like to point out Section

(Testimony of William John O'Keefe.)

26, which states, "In any such proceeding, the rules of evidence prevailing in courts of law or equity shall not be controlling." I wish to add on the further ground——

Trial Examiner Kent: In apropos of that, they are substantially controlling. We attempt to follow the general rules of evidence.

Mr. Collins: ——on the further theory the principal is now receiving a report from his agent, and I would like to have an answer. You may answer.

Mr. Nicoson: No.

Mr. Tyre: What do you mean, "You may answer"?

Mr. Nicoson: He now sustains the objection. That is the last ruling.

Trial Examiner Kent: No. I read something further in the offer of proof. If you submit a proposition of that sort to your clients for action by the clients, I think then [1443] that this line of inquiry might be proper.

Q. (By Mr. Collins): Did I submit any kind of a proposition to you after discussing this matter with Mr. Despol?

A. Do I answer or don't I?

Trial Examiner Kent: There hasn't been an objection as yet. Yes.

The Witness: Yes, you did.

Q. (By Mr. Collins): What was the proposition?

Mr. Tyre: I object to that.

Mr. Nicoson: Same objection.

(Testimony of William John O'Keefe.)

Mr. Tyre: Same reasons apply to this question.

Mr. Nicoson: He has already told him what he wants him to say.

Mr. Collins: Everybody knows what he is going to say. What is the use of all the objecting?

Mr. Nicoson: Why have him say it? You are the fellow that ought to testify, not Bill O'Keefe. He wasn't there. He don't know what was said.

Mr. Collins: People testified already they were there.

Mr. Nicoson: You can't attack Bill O'Keefe's credibility through you or your credibility through him.

Mr. Collins: I am not attacking anybody's credibility.

Mr. Nicoson: I certainly want it in such a shape I can attack if if you are doing it.

Mr. Garrett: Mr. Collins can't testify as to confidential communications. You ought to know that, Mr. Nicoson. [1444]

Mr. Nicoson: If it is a confidential communication this witness can also claim the privilege, if he wants to.

Mr. Tyre: Or waive it.

Mr. Nicoson: Yes.

Mr. Garrett: He is not claiming it, I notice.

Mr. Nicoson: All right.

Mr. Schullman: I think we have missed one thing. A lot of these objections are very well taken, except in a Labor Board proceeding, in order to bind a principal you must show knowledge of the

(Testimony of William John O'Keefe.)

principal and agency's act. If attempts to show communication of the principal, I think the Board of Examiner should be advised.

Mr. Garrett: I think there is something to that point.

I believe there has been a good deal of light and rather airy discussion, but there are a couple of things involved in relation to this conversation that bring to mind certain principles that I think ought to be considered by the Trial Examiner.

One of those principles is this: As Mr. Schullman said, in these proceedings, or in any proceeding where a party negotiates through an attorney it is not only permissible, but very advisable to bring out the facts as to whether or not the negotiations were brought by the attorney to the attention of his principal. The reason [1445] for that is that the agency of an attorney is not a general agency, but a special agency. It isn't true that in any, all or even a majority of cases the proposal, the proposition given or received by an attorney are properly held to be the proposition, proposal given or received by the client.

It is necessary in the case of negotiations through an attorney, that are outside of the scope of employment, in conducting a particular piece of litigation, to show whether or not those matters were communicated to the client sought to be bound. In this case the client sought to be bound is Mr. O'Keefe. It is very material to find out what he learned about Mr. Despol's proposals.

(Testimony of William John O'Keefe.)

Mr. Collins: It goes to the question of good faith, your Honor. If this witness knew at the time that his company signed up with the A. F. of L. that somebody else was in there asking for the bargaining right, that is one thing; that is an important thing to do.

This is the only way it can be brought out, by conversation that was had between Despol and myself. They keep talking about my taking the witness stand, your Honor. I may decide to do so. I don't like to take the witness stand in any case. I am an attorney. I am not a litigant. I am not a party litigant in any of these proceedings. These other attorneys know it as well as I do. I am not here [1446] with associate counsel to put me on the stand and examine me. I consider it contrary to the canon of professional ethics to get up and testify and argue about my own testimony, especially when I know this is going to go before the courts of law, the highest court of law. I don't feel it my duty to get up and testify.

Mr. Tyre: Mr. Garrett made two remarks. One is that the company in this case, the principal cannot be bound by the acts of the agent, unless the principal knew what the agent was doing. Secondly, in the case of an attorney, he has no general power to act in these sort of matters, unless he has been specifically granted that power. I think both arguments are entirely fallacious.

I think by the law of the National Labor Relations Act that a principal can be bound by the un-

(Testimony of William John O'Keefe.)

fair labor practices committeed by its agents, employees or servants, even though no specific knowledge of that particular act has been given to the principal or no specific instructions have been given by the principal to the agent.

Secondly, in any event, there is already plenty of testimony in this record that Mr. Collins was bargaining for and on behalf both Pioneer Electric Company and O'Keefe and Merritt with various labor organizations. He had the power to negotiate back and forth with these labor organizations. Therefore, he had the general power [1447] to negotiate and bind the employer with reference to labor negotiations.

Therefore, even if the first rule didn't apply—and it does—anything said by Mr. Collins with reference to labor matters would be binding upon his principal upon the ground he was held out as a general agent for that purpose.

Mr. Collins: That is an incorrect statement of the fact. In the first place Mr. W. J. Durant, or whatever his name was, was the one that signed the contract with the A. F. of L. There is no showing I had any authority to sign a contract with the American Federation of Labor on behalf of Pioneer. My authority was strictly limited in that case.

If your Honor please, I think your first ruling was substantially correct. It should have been that this goes in subject to being connected up. I have a witness beside me who was at all these conversations. There is no necessity for me to take the stand.

(Testimony of William John O'Keefe.)

I think they should be backed up with as much corroborative testimony as possible, for the sake of the record.

Mr. Nicoson: I think if he has better evidence than this he ought to be made to resort to it.

Trial Examiner Kent: Read the pending question.

(The question was read.)

Trial Examiner Kent: He may answer. [1448]

The Witness: You told me you were bargaining with Despol for O'Keefe & Merritt Company, and in return for handling the thing in a quiet and orderly manner—in fact, if I remember correctly, you wanted to refer it to the Labor Relations Board. And in consideration for no strikes or violence of any kind you had discussed with Despol paying his organizational expense and so forth he had incurred so far in the organization of our company.

Q. (By Mr. Collins): I was going to pay it or I would see my client——

A. You asked me if the company was willing to pay that expense.

Q. Now, then, Mr. O'Keefe, referring to the spring of 1942 or 1944, wherein Mr. Charles Spallino, Mr. Joe Spallino, and myself were in my office, the factory of the O'Keefe & Merritt Company, do you recall having heard any conversation between Mr. Charles Spallino, Mr. Joe Spallino and myself?

A. I do.

Q. Will you relate the conversation?

(Testimony of William John O'Keefe.)

A. Charlie and Joe came up to your office and discussed, as I recall it, two points. One was——

Q. Just a moment. Were you in my office when they came up?

A. I was there before they came up.

Q. Were you in there pursuant to any pre-arranged plan to talk to these men, or were you in my office on other business? [1449]

A. I had no pre-arranged business to talk to anybody about. As far as I was concerned, they were a surprise.

Q. Relate the conversation.

A. They came in discussing two points. It seemed that Charlie wasn't getting along fast enough with his compensation on his injury. You had handled the matter, or had had it handled by the doctor of the company. You gave him some instuctions about that, which I do not recall.

At the same time he was asking for a raise and gave you a very detailed description of why he should be paid twice as much money, which you told him you would discuss with me, and they left.

Q. Did he complain about working nights or anything about his hours?

A. He gave you the story that I didn't know ahead of time that he had not been surprised with having worked at night. He realized that he was being put in a position where he would he a night supervisor, but he didnt' like the idea of the night work, regardless of the money. He wanted to work daytime, and thought he was still worth more money.

(Testimony of William John O'Keefe.)

Q. Where did he get the idea he was going to be a night supervisor? A. From me.

Q. What did you tell him in that connection?

A. At that time we were making projectors for the Armed [1450] Services. We had a sixty-nine point inspection program on each one of these projectors, which necessitated quite a crew of people on some rather intricate gauges. It was such a specialized job I felt Charlie could learn to handle it without any trouble. I told him when he came back to work, at that time the doctor said his arm was weak and he wouldn't be able to do any heavy work of any kind.

I thought this would fit right in with something he could take care of, because of the injury and long service with the company, and I wanted to see if we could put him in a position to make a little better job than he had prior.

Q. What was he making prior to the injury?

A. Either 85 or 90 cents an hour.

Q. When he came back what did you pay him?

A. I believe we started him, when he first came back, in exactly the same pay and told him as he learned the job we would raise him. I know we ended up paying $1.30 an hour.

Q. Did you take anybody off the job to give him the job?

A. We had a man in charge of it at that time, yes.

Q. Whom did he replace?

A. He replaced a fellow whose name I have for-

(Testimony of William John O'Keefe.)

gotten. He came out here from the east. He was a specialist at that type of work.

Mr. Garrett: I notice the hour of 3:30 has arrived. Will there be an afternoon recess? [1451]

Mr. Collins: I want to ask about two more questions, and then I am through with him, Mr. Garrett.

Trial Examiner Kent: Finish the questions.

Q. (By Mr. Collins): Were there women in the department you put him back in?

A. Yes.

Q. Were they doing the same type of work?

A. You are now discussing the department he first went back in with the offer of night supervisor job?

Q. When he first came back or any time thereafter, what did you do with him?

A. After he started on this night supervisor's job, he decided he either didn't like the night work, part of what he told me—it was quite a long, drawn-out story. There were women on that job. We then transferred him to two or three other departments, all of which had women working in them.

The job I am talking about, where he ended up making $1.30 an hour, he replaced a girl.

Q. Do you know whether or not I am paid on a fee basis by O'Keefe & Merritt or paid a weekly salary?

A. As far as I know you are paid by the month, and have been for eight or ten years.

Q. I am paid by the month whether I work or not? A. We don't expect you will not.

(Testimony of William John O'Keefe.)

Q. Was it part of your job as plant superintendent to meet [1452] with grievance committees?

A. It has been ever since we had a grievance committee.

Q. Tell us about the grievance committee, what the set-up was on that?

A. The gievance committee was inaugurated for a number of years, around '36 to '40, somewhere around there.

Q. Where were they from?

A. The members of the grievance committee were made up of a member of each department in the factory. It seemed to die a natural death; we hopefully surmised they had no grievances. [1453]

It was revived again in about '42 or '43, somewhere in that general time, although I don't recall the exact time, because there was no special time or place designated for grievance meetings.

Q. Mr. Spallino, did he have anything to do with those grievance committees?

A. He went through the shop and took a vote, as I understand it, from each department on who that particular department would like to have the responsibility of representing them on their grievance committee.

Q. Did he pick the committee or did the employees vote on who should be their committeeman in each department?

A. It was my understanding it was rather a joint venture, that Charlie took a vote of the concensus of the department, and then selected the men

(Testimony of William John O'Keefe.)

that suited the majority of the people in the department.

Mr. Collins: You may cross-examine.

Trial Examiner Kent: We might take a five-minute recess at this time.

(A short recess was taken.)

Q. (By Mr. Collins): Did you seek admission, Mr. O'Keefe, to the Pioneer Electric Company partnership? A. Did I seek admission to it?

Q. Yes.

A. I would say it was more of a mutual venture.

Q. What was your reason for getting in?

A. In the first place it appears to me that the purchasing and building of these generator parts is very lucrative as a business and should be a fairly substantial profit. That would be enough reason. Along with that, from O'Keefe and Merritt's standpoint, we would have very definite tax savings and a definite advantage in presenting our case to the O.P.A. for a new price on our range.

Q. Do you expect to make any money out of the manufacture of gas ranges from your partnership interest in the Pioneer Electric?

A. None particularly. It is on a cost plus, a very small profit arrangement.

Q. So far as you are personally concerned, you are better off with your profits through O'Keefe and Merritt? Is that the gist of your testimony?

A. I don't think I quite understand.

Mr. Garrett: That is very leading.

Mr. Collins: I will withdraw the question.

(Testimony of William John O'Keefe.)

Q. (By Mr. Collins): Do you expect, as a partner of the Pioneer Electric Company, to make any profit from the manufacture of the gas ranges?

A. Yes, there will be a small profit.

Q. Did you get into the partnership and attempt to get the right to manufacture gas ranges to circumvent any National [1455] Labor Relations Board conducted elecion?

Mr. Nicoson: Objected to as calling for a conclusion of the witness, a legal conclusion of the witness.

Trial Examiner Kent: Reframe the question.

Q. (By Mr. Collins): Does it make any difference to you whether the Pioneer Electric Company signs up with the A.F.L. or the C.I.O.?

A. No.

Q. Are you willing to submit to a Board conducted election on behalf of the employees of the Pioneer Electric Company? A. Yes.

Q. You would bargain with whichever group won that election; is that true? A. Yes.

Mr. Collins: That is all. Wait a minute.

Q. (By Mr. Collins): Do you know how many employees the Pioneer Electric Company took over from the O'Keefe and Merritt Company on February 4th?

A. No, I do not. I would say it was somewhere —I would make a guess at around 300. I don't know exactly.

Mr. Collins: That is all.

Mr. Nicoson: No questions.

Mr. Tyre: No questions.

(Testimony of William John O'Keefe.)

Cross-Examination

By Mr. Garrett:

Q. Mr. O'Keefe, you spoke of the AFL [1456] charter in 1936 or 1937. Do you recall the name of the person you mentioned as having been president of the organization at that time?

A. I think the first name was William; nickname was Bill Chamberlin.

Q. That was a charter of the Stove Mounters Unions; was it not?

A. So far as I knew, yes.

Q. And Mr. Petero, who is connected with the Stove Mounters, here at my left, he was an employee of yours at that time; was he not?

A. Mr. Petero has been an employee of ours, I think, three or four different times. He has been on and off the payroll.

Q. Mr. Petero is just back from the wars now, and is now representing the Stove Mounters Union?

A. I know.

Q. That was quite a long strike that occurred in 1936 and 1937; was it?

A. I think we had a semblance of a picket line for something in excess of a year and a half, two years, approximately.

Q. I take it, when you say a semblance you mean the picket line diminished as time went on?

A. Diminished to one.

Q. Dimished?

A. Diminished to one person. [1457]

(Testimony of William John O'Keefe.)

Q. To one person? A. Yes.

Q. Those were the days here in our fair city when we had an ordinance that limited the number of pickets? You recall that; do you not?

A. Yes.

Q. You wouldn't blame the Stove Mounters for obeying the law; would you?

A. I think in that case they bent over backwards.

Q. I beg your pardon?

A. I think in that particular case they bent over backwards to see they didn't infringe.

Q. Mr. Collins said they started out with 2000 pickets; is that correct?

A. I don't think we actually counted heads, but they enclosed about five acres of ground with a solid line.

Q. And I judge from what you say there were a few heads broken on either side.

A. Yes, there were.

Q. That is, the skin, I mean, on them.

A. Yes.

Q. Now, Mr. White, who was here and testified, but whom I don't see here now, tells me he was secretary of the Central Labor Council in the Bay District in Oakland at that time, and that he impaired your sales somewhat by enforcing the boycott against the O'Keefe and Merritt products in northern California during that strike. Do you recall that? A. Yes, I do.

Q. It had some effect on the company's sales?

A. A very considerable effect.

(Testimony of William John O'Keefe.)

Q. You knew enough about the situation to realize that once the war was over the boycott might begin to commence to exert an effect upon the sale of the peace time products? A. That is right.

Mr. Nicoson: I object to that as calling for a conjecture of the witness.

Trial Examiner Kent: Read the question.

(The record was read.)

Trial Examiner Kent: I think, in view of the witness' position with the company and past experience, he may answer.

Mr. Nicoson: He already answered.

Q. (By Mr. Garrett): How long has Mr. Spallino been on the O'Keefe and Merritt payroll?

A. Which one?

Q. Charlie.

A. I couldn't say exactly. I have been there approximately 15 years and he was there when I got there.

Q. Is he working for the company now or for Pioneer?

A. He is working for O'Keefe and Merritt Company.

Q. What department? [1459]

A. The last time I saw him he was in the service department.

Mr. Collins: I will offer to stipulate, Mr. Garrett, he is now working in the shipping department.

Mr. Garrett: Today?

Mr. Collins: Today he is working in the shipping department.

(Testimony of William John O'Keefe.)

Mr. Nicoson: I thought there wasn't any shipping department.

Mr. Collins: There is now.

Mr. Garrett: I will stipulate Mr. Spallino is working today. At least I don't see him here in the court room.

Trial Examiner Kent: I thought the record did show that shipping was still O'Keefe and Merritt.

Mr. Collins: Ask him about the shipping department; he knows about it.

Trial Examiner Kent: Ask the witness. Let's get the record straight.

Q. (By Mr. Garrett): Is the shipping department operating at the present time?

A. It is.

Q. And those employees, are they carried on the O'Keefe and Merritt payroll?

A. They are.

Mr. Collins: I will offer to stipulate the Service Incorporated went out of business on January 20th and the [1460] employees of the Service Incorporated were taken over by the O'Keefe and Merritt Company.

I will further offer to stipulate Mr. Bob White is an expediter and has nothing to do with the shipping department at the present time. He was promoted as of January 20th.

Mr. Nicoson: I will go with you on your stipulation as to Service Incorporated. I don't know anything about Bob White, so I can't stipulate to that.

Mr. Collins: Ask him about Bob White.

(Testimony of William John O'Keefe.)

Q. (By Mr. Garrett): Now, this shipping department, that is carried in connection with the O'Keefe and Merritt business; is it not?

A. That is correct.

Q. That is where the stoves go out from, I take it. A. Yes.

Q. This union that was formed, Stove Mounters Local Union, in 1936 or 1937, did you know their officers?

A. I think I did, yes. I did know them at the time. I am not sure I would remember all of them.

Q. Did they attempt to negotiate as a union with the company prior to the strike?

A. Not to my recollection.

Q. Were there various proceedings here before this Regional Board brought by them against the company?

A. There were proceedings brought at the time.

Q. Proceedings relating to this charge and that sort of thing?

A. Something along that nature. I don't remember the details.

Q. As a matter of fact, there were many such proceedings here; were there not?

A. O'Keefe and Merritt Company have at various times in the past 10 years been here for some reason or other.

(A short recess was taken.) [1462]

Trial Examiner Kent: Proceed.

Q. (By Mr. Garrett): Can you say of your own knowledge that it is not a fact that some of

(Testimony of William John O'Keefe.)

those charges filed by the A. F. of L. in those days are not still unadjudicated and pending here against the company? A. I don't know.

Q. That could be a fact? A. It could be.

Q. But at any rate you knew of those unfair labor practice charges at the time the CIO came in and tried to organize the plant in 1945, is that a fact?

A. I am afraid I don't understand the question.

Q. You knew of the existence of unfair labor practice charges by the A. F. of L., did you not, when the CIO came in and tried to organize the plant in 1945?

A. As I think I have stated, I don't know whether they had ever been written off the books or not. Whether they were still in existence is something I wouldn't be prepared to state.

Q. As a matter of fact, the CIO didn't display any interest in the plant at all, did they, until the war came along? A. No obvious interest.

Q. You are familiar with the contract now existing, I take it, Mr. O'Keefe, between the Pioneer co-partnership and the [1463] A. F. of L.?

A. In a very general way, yes.

Q. You are familiar with the fact that that contract has a no strike clause in it ?

A. That is correct, yes.

Q. You knew, did you not, Mr. O'Keefe, that as long as that contract continued, the A. F. of L. would not strike the Pioneer co-partnership, did you not?

Mr. Tyre: That is objected to.

(Testimony of William John O'Keefe.)

Mr. Nicoson: Objected to. That calls for a legal conclusion, and also an interpretation of the contract.

Mr. Garrett: I just want to show the parties that an adjudication in favor of the company in this action will put the A. F. of L. in a position where they on the one hand are bound by a contract which they intend to observe, and which prevents them from continuing their economic measures against this company, whereas the CIO unions, interlopers on the face of the record, will be enjoying whatever benefits accrue from representing the employees in the company.

Mr. Tyre: I take it if the Board orders this company to withdraw recognition from the A. F. of L. Union, the contract will be a nullity and the A. F. of L will obey the order of the National Labor Relations Board.

Mr. Nicoson: That is a legal conclusion which this witness cannot in any event make. [1464]

Trial Examiner Kent: Reframe the question.

Q. (By Mr. Garrett): You expect the state court to enforce this contract you have entered into in good faith with the A.F.of L., do you not?

Mr. Tyre: I object, calling for a conclusion.

Mr. Nicoson: Same objection.

Trial Examiner Kent: The objection is sustained. I think that can be covered quite well by argument.

Q. (By Mr. Garrett): Did the A.F.of L. organ-

(Testimony of William John O'Keefe.)

izing attempts continue after the strike in 1936, 1937, and up until the time of the war?

A. I believe they made some attempts.

Q. You saw Mr. Petro frequently during that period, did you not?

A. Yes, he was around the plant quite often.

Q. Attempting to organize, or do you know what he was doing?

A. I didn't know what he was doing. I would presume he was organizing.

Q. Do you recall anything being said at that first conversation in Mr. Collins' office when Charlie Spallino was there complaining about his workmen's compensation case, do you recall anything being said at that time about his having gone to a C.I.O. meeting? A. No.

Q. At that time Mr. Spallino has testified the Five and Over Club [1465] was fighting the unions, is that correct?

A. The Five and Over Club conducted their business, as far as I know, to suit themselves as any other private organization would do. The company had absolutely nothing to say in any matter of how they conducted their own personal business.

Q. It is an independent association that has its own officers?

A. That is true. At various times the Five and Over Club have done things which were beneficial to O'Keefe and Merritt Company, but always thoroughly through their own volition, never at any request of ours.

(Testimony of William John O'Keefe.)

Q. They have in their membership in the Five and Over Club, do they not, not only production workers, but office workers?

A. They have in their membership anyone who has been associated with O'Keefe and Merritt Company in excess of five years.

Q. Those persons are eligible, and do they automatically become members of the Five and Over Club or only on application?

A. They only become members if they put in their application and go through the due process of initiation and begin paying their monthly dues, as everybody else does.

Q. And the Five and Over Club, how long has it been in existence?

A. I would judge 11 to 12 years.

Q. Did it come into existence before the strike?

A. About between two and three years, I believe, before the strike.

Q. How did that club come to be organized?

A. When the club was organized, I believe the thought in back of it was my father's. A number of accidents had occurred to some of the people in the plant which were non-compensable, and at that time I didn't believe that the average fellow working in a plant carried any kind of hospitalization or insurance outside of something that had been partcipated in with the company. So my understanding of it was that—and I am sure this is the correct idea—that the club was started with the idea of paying benefits to those people out of the

(Testimony of William John O'Keefe.)

club treasury which would in some way carry them over any short non-compensable accident period that they might have, and at the same time it was organized, any officer or financially participating member of O'Keefe and Merritt Company was excluded from membership, except on an honorary basis.

Q. How many employees went out at the beginning of the strike?

Mr. Nicoson: Objected to as immaterial.

Trial Examiner Kent: The answer may be taken.

The Witness: We are discussing the strike of 1937 and 1938, whenever it was, around there?

Q. (By Mr. Garrett): Yes.

A. As I remember, there were approximately 35.

Q. Was Johnny Lovasco one of them?

A. I don't remember.

Q. Was Kenneth Petro one of them?

A. Yes. I might qualify that answer. I know that Petro was in the picket line at all times. Whether he was on the table at that moment, I don't know.

Q. Those were the days when a man went out on strike, he was not an employee any more, is that your understanding?

A. I think that was the general practice in Los Angeles at the time.

Q. Are the O'Keefe and Merritt employees at the present time compensated on any piece work or bonus basis?

A. The only employees that O'Keefe and Merritt

(Testimony of William John O'Keefe.)

have at the present time are truck drivers, service men, and maintenance workers, and there is no basis on which we know how to fit that on a piecework or bonus basis. [1468]

Q. Prior to February 4th of this year did O'Keefe and Merritt operate any piece work, bonus or division of profit system?

A. O'Keefe and Merritt always operated in any way, shape or form that was possible a bonus or piece work system of some sort.

Q. Immediately prior to the date I have mentioned, February 4th, 1946, what type of system was being operated?

A. We used both the group bonus plan and a straight piece work or output per hour plan for an individual worker.

Mr. Tyre: May I have that answer read?

(The last answer was read.)

Q. (By Mr. Garrett): Did you compute your piece work compensation on what is known as the Bedeaux system? A. No.

Q. That is, registering the number of normal hours required for a given operation and then paying premiums for production over that?

A. We did not do that on the individual piece work basis, but that was basically the theory on which we set up most of the group bonus plans.

Q. I take it the Pioneer Electric Company is not operating any piece work system at the present time?

(Testimony of William John O'Keefe.)

A. I believe they are using piece work. To the best of my knowledge, they are using piece work in some of the [1469] individual operations. I believe there are two small group bonus plans, but as far as the actual stove mounters and assemblers are concerned, there is none.

Q. Straight hourly wages?

A. That's right.

Mr. Garrett: No further questions.

Redirect Examination

By Mr. Collins:

Q. What does Bob White do at the present time?

A. Bob White at the present time would be the co-ordinator between the sales department and the shipping department.

Q. Do you know when the employees of Service Incorporated, went to work for O'Keefe and Merritt Company?

A. Sometime toward the end of January. I don't remember the exact date.

Q. Of what year? A. 1946.

Mr. Collins: That's all.

Recross-Examination

By Mr. Nicoson:

Q. Do you know who the officers were in Service Incorporated?

A. To the best of my knowledge—well, I guess

(Testimony of William John O'Keefe.)

I would have to answer no. It is a corporation. I don't know what it is.

Q. Are you an officer? [1470]

A. No. I missed that.

Q. Do you know whether your Dad was an officer or not? A. I know he was not.

Q. He was not?

A. I think I can safely say that no one connected with O'Keefe and Merritt Company was an officer of Service Incorporated.

Q. By that do you include owning the stock in Service Incorporated? A. That's right.

Q. You say they had connection?

A. We had no connection. As far as I know, no one holding officer's capacity in O'Keefe and Meritt Company had any stock or any connection with Service Incorporated.

Mr. Nicoson: That's all.

Q. (By Mr. Tyre): Just a minute, I would like to ask you a few questions. What is your capacity at the plant, that is what was it at O'Keefe and Merritt?

A. When you say "What was it," how far back do you intend to go?

Q. Let us say for the past two years.

A. For the past two years?

Q. Yes.

A. We don't have any titles around O'Keefe and Merritt Company. I suppose in the ordinary organization, I would [1471] be either the plant superintendent or a general manager, or something of that type.

(Testimony of William John O'Keefe.)

Q. You are familiar, I take it, from the answers you gave to Mr. Garrett's questions concerning these group bonus plans and the piece work system——

A. How do you mean "familiar"?

Q. You are familiar with how they are worked out and the basis for them, is that correct?

A. That's right.

Q. Did the group bonus that an employee would receive vary from week to week, or was that constant? A. It would vary from day to day.

Q. Was the employee paid by the day or by the week?

A. By the week. His earnings, however, were computed by the day.

Q. Was an employee given a guaranteed hourly rate for the week?

A. The employee was given a guaranteed hourly rate by the hour.

Q. And it was paid by the week, that guaranteed hourly rate, is that right, times forty for the normal hours he worked?

A. Not necessarily. It would be the number of hours he worked.

Q. In other words, at the end of the week, you would compute [1472] the number of hours that the employee worked, and multiply that by his guaranteed hourly rate, and if that was less than he would have earned under the bonus plan, you paid him what he would have earned under the bonus plan, rather than the straight hourly rate?

(Testimony of William John O'Keefe.)

A. I didn't say that.

Q. What is the fact?

A. As I stated before, the bonus plan is operated on a day to day basis, and he is guaranteed an hourly rate for the amount of hours he is there for any one particular day. At the end of that week, that is added into a total for the number of days he has shown up that week, and he is paid on that basis.

Q. Let me put it this way. Let's assume a worker is on a dollar per hour basis, that the worker works 48 hours that week and has no bonus plan in effect. You would have paid him $52.00 for that week, is that correct?

A. Less his insurance——

Q. Less the usual deductions for unemployment and social security and so forth?

A. That is the common practice, yes.

Q. On the assumption that that same worker the following week was a group bonus plan of some sort, by which bonus plan he would have earned 20 cents an hour more than a dollar per hour, averaged over the week, he would then, I [1473] take it, have received $1.20 per hour multiplied by 48, would that be right?

A. That is not correct. I would be glad to give you an hour long dissertation on how we do it.

Q. I don't want an hour long dissertation. I would like to know briefly, if you can tell us, how you actually determine when a man was entitled to his minimum guaranteed hourly rate, and when he would get more than that.

(Testimony of William John O'Keefe.)

Mr. Collins: Objected to, incompetent, irrelevant and immaterial.

Mr. Tyre: This matter has been gone into on both direct and on cross by Mr. Garrett, and I want to know the actual facts.

Mr. Collins: Mr. Garrett did not have this man on direct examination. He cross-examined him.

Trial Examiner Kent: You may take the answer.

The Witness: The bonus is figured daily. At any time or any given period, the man is guaranteed his base rate, which I think is a state law. I am not sure, but I believe it is. If for one day he averaged 50 cents an hour on his bonus plan over and above his hourly rate guaranteed, he would be paid that for that day. If on the second day, for some reason, either his troubles or troubles beyond his control, he came up with 50 cents less than his hourly guaranteed rate, we still paid the guarantee for that one day, so as an average for the two days, he had then made, we would pay half of his bonus. [1474]

If, however, he had made 10 cents on the second day, he would have been paid the $1.10 average for that day. So his check at the end of the week would be a computation of all the days on which he had failed to make bonus or worked on some job not paying bonus, it would be computed for those days or hours at his base rate, and the days or hours on which he had put in a successful time on the bonus or piece-work basis, he was given credit for that. At no time was any deduction ever made for any

(Testimony of William John O'Keefe.)

loss on falling below the standard rate. We didn't average it at any time.

Q. (By Mr. Tyre): Was it the practice of your company to pay at the rate of time and a half beyond 40 hours?

A. We pay time and a half beyond 8 hours a day and beyond 40 hours in a week, except when it was a week in which a holiday came, and then we paid time and a half beyond 32 hours. I believe that is a federal law.

Q. When you pay time and a half beyond 40 hours in any week, did you pay that on the basis of the man's guaranteed hourly rate?

A. If a man was working at a straight hourly job, we pay time and a half on his hourly rate. If he was working on a job where over the period of the week he had worked on some piece work or bonus in which he exceeded his hourly rate, I believe the federal law provides that he must be paid time and a half on his average hourly earnings. [1475]

Q. A man with a $1.00 base rate was able with a bonus to earn $1.20 an hour, then the time and a half for the hours worked beyond 40 was figured on the $1.20? A. That is the law.

Q. I am asking you if that is what you did?

A. I am sure we would comply with the law, and I think that it what we did.

Q. I take it the same plan was followed for the individuals on straight piecework?

A. That is correct.

Mr. Collins: I don't like to interpose objections, but——

Mr. Tyre: That is all I have.

Mr. Garrett: I was going to ask him what the attorney made per month. That is proper cross-examination. You opened it.

Mr. Collins: Go ahead. Whatever I got, I got it for doing nothing, until this trial came on, I think. Is everybody through with the witness?

Mr. Garrett: No questions.

Mr. Nicoson: I don't have anything further.

Mr. Tyre: That's all.

Mr. Collins: You may step down.

Trial Examiner Kent: You may be excused.

The Witness: Thank you.

(Witness excused.) [1476]

Mr. Collins: Mr. John Lovasco.

JOHN LOVASCO

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Collins:

Q. When did you first go to work for O'Keefe & Merritt Company? A. April 22, 1936.

Q. When did you first join the American Federation of Labor, if you did?

A. Oh, sometime, I would say, in about August of 1936.

Q. Were you an officer of the American Federation of Labor?

(Testimony of John Lovasco.)

A. Yes, I was one of the officers.

Q. What office did you hold?

A. Well, I was—I don't recall now right offhand whether I was treasurer or sergeant-at-arms. I really don't know. It has been 10 years ago.

Q. When they went out on strike, did you get out and get on the picket line?

A. That particular time I come down with sinus trouble, which I have, and I was out about, I believe, 10 days.

Q. Were you in the Armed Services during the war? A. Yes.

Q. Did you work for O'Keefe & Merritt until the time you joined the—what branch of the Service were you in? [1477] A. United States Navy.

Q. Were you working for O'Keefe & Merritt up until the time you joined the Navy?

A. Yes.

Q. When did you come back from the Navy?

A. I returned back to O'Keefe & Merritt April 23, 1945.

Q. 1945? A. That's right.

Q. What did you do concerning your union activities then?

A. Well, I immediately took hold of where I left off.

Q. What do you mean by that?

A. Well, where we left off in 1936. I saw that Los Angeles had become very union-minded, so I thought, well, I better get in and pitch for my side of the blood.

(Testimony of John Lovasco.)

Q. Did you contact anybody in the plant to help you work? A. Yes.

Q. Whom did you contact?

A. Charlie Spallino.

Q. Did anybody from the company tell you to contact Charles Spallino? A. No, sir.

Q. Did anybody from the company tell you to organize the union? A. No, sir.

Q. Did anybody from the company, as a matter of fact, know [1478] that you were organizing the union? A. No, sir.

Q. Calling your attention to the first day of October, 1945, or thereabouts, did you and Mr. Charlie Spallino have occasion to go into the office of Mr. D. P. O'Keefe, the president of the O'Keefe & Merritt Company? A. Yes, I did.

Q. Will you relate what transpired?

A. Well, Charles Spallino, being the president of the Five and Over Club, wanted Mr. O'Keefe's version of which side the Five and Over should sponsor.

Q. Which side of what?

A. What do you mean?

Q. Between the Catholic Church and the Masonic Lodge, or what?

A. Oh, the unions, the A.F.of L. and the C.I.O.

Q. And what did Mr. O'Keefe say to you?

A. Well, Mr. O'Keefe stated that it would be best if we kept our noses clean.

Q. Did he use those words?

A. Well, somewhere to that effect. I don't just quite remember.

(Testimony of John Lovasco.)

Q. What else did he tell you? Did he tell you to go out and organize either union?

A. Oh, no. [1479]

Q. What did he state about union activities, if anything?

A. Well, he didn't want any part of either unions.

Q. Didn't want any part of either union?

A. That's right.

Q. Instead of saying he didn't want them, will you state exactly what he said; what were his words, as best you can remember?

Mr. Tyre: Will you read that answer back there?

(The answer was read as follows: "Well, he didn't want any part of either union.")

Mr. Collins: Now, will you read the pending question?

(The last question was read.)

The Witness: The best I can remember right now is that Mr. O'Keefe said that he would rather not join any union, but if he had to, or the men had to, why, he was in hopes that they would pick out the A.F.of L. for the simple reason that they had been on the unfair list for so many years and they wanted to get off the unfair list.

Q. (By Mr. Collins): Was there any intimation that—did he say anything concerning what might happen to the men if they did or did not join either union?

A. No, he didn't say anything.

(Testimony of John Lovasco.)

Q. Was there any mention of my name in that conversation?

A. No, not at that particular conversation, there wasn't.

Q. Did you have any other meetings with Mr. Charlie Spallino [1480] and yourself in Mr. O'Keefe's office in which my name was mentioned?

A. Yes.

Q. What did he tell you in that connection?

Mr. Tyre: Object until there is a proper foundation laid.

Q. (By Mr. Collins): When was this conversation? A. There was a——

Trial Examiner Kent: And who was present?

Q. (By Mr. Collins): When was the conversation and who was present?

A. Well, present were Charlie Spallino, myself, and Mr. O'Keefe.

Q. Was his secretary there?

A. I don't recall.

Q. Was that before or after this first conversation you told us about? A. That was after.

Q. All right. Now, what happened at this meeting?

A. Well, that was the time when Charles Spallino wanted to give a speech at the Five and Over Club meeting the night of the election.

Mr. Tyre: I move that be stricken, your Honor, not responsive.

Q. (By Mr. Collins): Don't use the words "Charlie Spallino wanted to give a speech." Just relate what the conversation was. [1481]

(Testimony of John Lovasco.)

Trial Examiner Kent: Yes, just say what the various people said.

Mr. Tyre: I take it the motion to strike is granted?

Trial Examiner Kent: The motion to strike is granted.

The Witness: Well, at first before he was in Mr. O'Keefe's office, I had Charlie Spallino and myself go up to see Collins, because Charlie Spallino or myself don't really know how to get out and make a speech, so we scribbled a few words down to see whether it would be suitable to Mr. Collins, and Mr. Collins said that he didn't want to interfere, if we wantd to go ahead and make a speech, why, it was perfectly all right.

When I saw Mr. Collins wouldn't help us, I suggested to Charlie that we go down and see Mr. O'Keefe and see what he thought of it.

Q. And what did Mr. O'Keefe say to you?

A. Mr. O'Keefe glanced at the little slip of paper we had there, and he immediately threw it in the waste basket and said that he would get out and make a speech himself.

Q. Did he state whether or not he considered the matters that you had on your notes there appropriate to talk about at the Five and Over Club meeting? A. No, he didn't.

Q. Did he say anything about whether he wanted to take any [1482] action so far as your Five and Over Club activities were concerned? A. No.

(Testimony of John Lovasco.)

Q. Did you ever have any conversation with me in my office concerning union activity?

A. Yes.

Q. What did I tell you?

A. Well, there was a——

Q. Just a moment. Was Charlie Spallino present at any of these conversations?

A. There is one time, yes, Charlie Spallino was present.

Q. What did I say?

Mr. Tyre: Just a minute. When was this conversation?

The Witness: It was the night before the election.

Q. (By Mr. Collins): Relate the conversation.

A. Well, I just stated that a few minutes ago here, that we brought this slip of paper up there to you, and we wanted your advice whether it was the correct thing to talk about, and you said you wouldn't interfere. So then we went down to Mr. O'Keefe's office.

Q. Did I ever tell you, either alone or in the presence of Mr. Charles Spallino, that the company wanted to take sides for either union?

A. No.

Q. Did I ever tell you, or in the presence of Mr. Charlie Spallino, that [1483] any action would be taken against anyone who would join either union?

A. No.

Q. Did I ever tell you, yourself, or in the presence of Mr. Charlie Spallino, that the employees could join any union they wanted to?

(Testimony of John Lovasco.)

A. What was that again, please?

Q. Did I tell you——

Mr. Tyre: Just a minute now.

Mr. Collins: Read the question.

Mr. Tyre: Just a second before you read it. Mr. Examiner, I think you heard it, and unfortunately, perhaps, the witness hasn't, but I object to that because it is leading and suggestive.

The Witness: Could I have the reporter read the question?

Mr. Tyre: Just a second on that.

Trial Examiner Kent: Reframe the question.

Q. (By Mr. Collins): Was any mention made in any of your conversations with me, either when you were alone with me or in the presence of Mr. Spallino, regarding what the attitude of the company would be toward your joining or anybody joining a union? A. No.

Mr. Tyre: Object to any conversations where Mr. Spallino was not present, and only this witness and Mr. Collins [1484] were present. It certainly can't be binding on the C.I.O. Let him testify as to a conversation where Mr. Spallino was present, if anything was said.

Q. (By Mr. Collins): Calling your attention to the first day of October, 1945, in my office in the presence of Mr. Charlie Spallino, Mr. Charlie Spallino has testified that he went to my office with John Lovasco and Collins said, "Yes, naturally, we want the American Federation of Labor. The C.I.O. are a bunch of radicals," and so forth. Did you

(Testimony of John Lovasco.)

or did you not overhear such a conversation in my office? A. I did not.

Q. Did I ever say anything like that to you or to Mr. Charlie Spallino?

A. Not that I know of.

Q. You would have heard it if you were in there if it had been said?

A. If I was in there with Charles, I must have heard it, but I did not hear it.

Q. Now, on October 1, 1945, did you know of any C.I.O. activity around the plant at all?

A. No.

Q. Calling your attention to a meeting in Mr. O'Keefe's office at or about this date, Mr. Charlie Spallino testified Mr. O'Keefe told you to go see Mr. Collins, that they want off the American Federation of Labor's unfair list. Do [1485] you recall any such conversation as that? A. No.

Q. Did Mr. O'Keefe ever tell you to go see Collins about union activities? A. No.

Q. Did I ever direct you in any of your organizing activities in the O'Keefe and Merritt plant?

A. No.

Q. Calling your attention to another conversation that is alleged to have taken place in my office on the telephone at a time when Red Roberts and Joe Spallino and yourself were present and Charles Spallino—Joe and Charlie Spallino were present, Mr. Charlie Spallino stated on direct examination, I believe, to this general effect: That Collins said to Despol over the telephone, "We will lay off

(Testimony of John Lovasco.)

anyone who organizes on company time, that I do not know"—Collins did not know—"Any organizing was going on." Do you recall such a conversation? A. No.

Q. Did I ever tell you what would happen to you or anyone else who was organizing any union on company time? A. No.

Q. Did you ever punch out when you were doing your organizing activity for the union?

A. No.

Q. So far as you know, did anybody in the O'Keefe and Merritt Company or the Pioneer Electric Company, for that matter, [1486] know that you were doing any organizing for a union?

A. Did anyone know that I was organizing?

Q. Any of the officers, foremen, and so forth?

A. No.

Q. Do you recall attending a meeting in my office sometime the latter part of December, at which John Despol and several employees of the O'Keefe and Merritt Company, as well as yourself, were present, a meeting that took place after 4:30, after working hours? A. Yes.

Q. Did Mr. Despol ever tell you he didn't want you to attend any meetings? A. Yes.

Q. What did he say to you?

A. This was after I had already attended that meeting there, and it was, I believe, when they had put on their first demonstration, or so-called picket line, out there, that he, after the 8:00 o'clock whistle blew, why, naturally, I was coming in, straggling

(Testimony of John Lovasco.)

in a little late that morning, and he greeted me on a side street, and he says, "John," he says, "I don't want you to attend any more meetings, that Collins and I want to discuss this contract over."

I says, "As long as there is going to be a contract discussed," I says, "I will be there or other A.F.of L. members will be there to see that nothing is pulled."

So he then grinned at me and he says, "Johnnie, I like you very much." [1487]

I says, "I like you, too."

And he says, he told me, he says, "I don't want anything to happen to you."

I says, "I don't think anything is going to happen to me."

Q. Happen to what?

A. Happen to me. He says, "Well, we get means and ways of taking care of fellows like you."

Then, I says, "If you have, you take care of yours and," I says, "but I will take care of mine," and I walked away.

Q. Getting back to this first meeting we are talking about in the latter part of December, 1945, do you recall Mr. Despol presenting a contract, opening up negotiations concerning a prospective contract between the C.I.O. and the employees of O'Keefe and Merritt Company?

A. Yes. He had a contract there in his hands, and I believe Fred Rotter had another one in his hands, you had one on the desk, and Joe Sanchez had another copy of the contract.

(Testimony of John Lovasco.)

Q. There were several employees, in addition to myself and Mr. Rotter, there were several employees? A. That's right.

Q. Employees like yourself that had no official capacity there? A. That's right.

Q. Were all of the members of the A.F.of L. employees? [1488]

A. All the fellows I had up there were members of the A.F.of L.

Q. How about this Doyle?

A. Wait. I recall that. Doyle was not. I just about had him sold.

Q. You thought he might join?

A. That's right. I was still doing a little work on him.

Q. Was there any mention made of the Pioneer Electric Company at this first meeting?

A. Yes, there was.

Q. What did I say and what did Mr. Despol say?

A. Well, at the beginning of the meeting there, why, you pulled out the contract and says, "Well, I don't know whether there is much use of reading this contract over or not for the simple reason that there might be another company come in, the Pioneer Electric."

John Despol said that he should have—pardon me, that he made a mistake, that he should have had the Pioneer Electric on that contract.

Q. On what contract?

A. On that C.I.O. contract that he presented you.

(Testimony of John Lovasco.)

Q. Did he state anything about the Pioneer in connection with an election?

A. Well, he didn't say that the Pioneer was on the election; there was just the O'Keefe and Merritt was on the [1489] election.

Q. Did he say whether or not he should have had the Pioneer in the election?

A. Yes, he said that is where he made the mistake, he should have had them on the contract.

Q. And when I told him the Pioneer might take over the manufacture of these gas ranges, then what did he say?

A. Then he stated that he wouldn't take it laying down, if I recall his right words now, and that they went through quite a large expense of organizing the O'Keefe and Merritt Company, and they wouldn't take it laying down.

Q. And what did I tell him when he said the union had spent money organizing O'Keefe and Merritt?

A. You said that you would discuss it with your clients to see if they would reimburse them.

Q. Reimburse them for what?

A. For the campaign they had out there.

Q. And what did he say?

A. Well, he said he didn't want to talk money now in front of his boys—he addressed us as boys.

Q. Did I go ahead and discuss the question of wages after that?

A. Yes, but he didn't want to talk money matters.

Q. Did we discuss the Gaffers & Sattler contract?

(Testimony of John Lovasco.)

A. The Gaffers & Sattler name was brought up, but there [1490] was nothing about the contract, but he again said he didn't want no money brought up, and that is when I drew my conclusion that Johnnie was fishing for something else.

Q. Did he mention anything about a strike?

A. Yes, he did. He said he probably would have to come out and save face and strike the plant.

Q. And what did I say about the strike?

A. Well, I believe your words was, instead of striking, to keep it peaceful, that you didn't want to see nobody get hurt or no violence around there, to take it to court and let the courts decide.

Q. Did I say anything about police protection?

A. Yes, you did. You said that the police would get the men through.

Q. Was this question of organizing expense, reimbursing for the organizing expenses, was there anything said in connection with that and taking the action to court?

A. That all came up at the same time there.

Q. I don't believe the record is clear. Will you explain that? What do you mean by "It all came up at the same time"?

A. Well, when Johnnie said he wouldn't take this laying down, that he would have to strike the plant, then you said there would be police protection out there to get the men through, and I had already informed the A.F.of L. men that there was going to be a demonstration out there, and I said, [1491] "We want all members here protected." So they got their men out there and——

(Testimony of John Lovasco.)

Q. Was there anything said about the question of shutting off steel? A. Yes, there was.

Q. What was said about that?

A. Despol stated that he would shut the steel off, and I believe you made the remark there that he couldn't shut off your steel for the simple reason that you people had been buying steel through different concerns that they didn't know anything about and could never shut it off.

Q. Did I make any mention of a jurisdictional struggle between the A.F.of L. and C.I.O.? You don't understand the question.

A. No, I don't believe I understand you.

Q. I will withdraw that question. Did I state to Mr. Despol what I expected in exchange for any reimbursing of organizing expenses if my client were willing to put it up?

Mr. Tyre: Just a minute. I object to that as leading and suggestive. Let him state, if he knows, the entire conversation at that meeting in his own words, and not in Mr. Collins' words.

Trial Examiner Kent: Unless the witness' recollection is exhausted, I don't think you have laid a foundation.

Mr. Nicoson: I was about to suggest if this is done [1942] under the guise of refreshing the witness' recollection, his recollection is pretty faulty, because for the last 15 minutes he has been putting nothing to him but questions suggesting the answers. I thought probably that might be the reason he was doing it, so I did not object, but I am going to

(Testimony of John Lovasco.)

object now, because I think it is leading and I don't think it is proper.

Trial Examiner Kent: Reframe the question.

Mr. Collins: I don't think this man needs to have his recollection refreshed. The only thing is he has testified to conversations here and there and I am trying to get him to put it all toegther.

Mr. Tyre: You are telling him.

Q. (By Mr. Collins): State the conversation between myself and John Despol after I told him that the Pioneer Electric Company might be taking over the manufacture of those gas ranges, state everything he said and that I said. I want the whole conversation. You can even repeat things you have already said. Just start all over again and give us the conversation.

A. Well, that is it. I am going to have to repeat here, because he said he wouldn't take it laying down now that Pioneer is taking it over.

Q. Go on.

A. And to save face, he would have to strike, he had a few [1493] employees in there that he would have to strike the plant.

Q. Yes, go on.

A. And you said that you would have police protection out there and that the men would get to work. I called up the A.F.of L. representative and told him what was taking place.

Q. Don't talk about what you did after you got out of the meeting. Just tell me what else happened in this meeting.

(Testimony of John Lovasco.)

Mr. Collins: Mr. Trial Examiner, I submit it is very unfair to attempt to hold this witness down to relating a conversation that took place in my office. I believe it has been testified Mr. Despol came in at about 4:30 and didn't get out until 5:15. To have this man relate a 45-minute conversation is very difficult unless I am able to segregate the portions I want him to talk about.

Q. (By Mr. Collins): Continue with as much of the conversation as you can relate, Mr. Lovasco. What was said in connection with this organizing expense?

A. Well, you told him that you would see your client and see if he could be reimbursed for the expense he had been through.

Q. If he would do what?

Mr. Nicoson: Well, here we are, going around and around again.

Mr. Tyre: There we go again, your Honor.

Trial Examiner Kent: That has been asked and answered.

Mr. Collins: It hasn't all been brought out yet.

Mr. Tyre: Collins has answered for him.

Mr. Collins: I am not the witness.

Trial Examiner Kent: Go ahead.

The Witness: If he would take the wolves away from the door.

Q. (By Mr. Collins): What else was said in that connection, if anything?

A. That he would keep it peaceful and quiet and that he would agree to take it to court.

Mr. Collins: You may cross-examine.

Trial Examner Kent: I think we will adjourn until tomorrow morning at 9:30.

(Whereupon, at 5:00 o'clock p.m., an adjournment was taken until Thursday, March 28, 1946, at 9:30 o'clock a.m.) [1495]

Thursday, March 28, 1946
10:00 o'Clock A.M.

Trial Examiner Kent: On the record.

You said you knew Mr. Collins would be late, Mr. Garrett. I think we might proceed with the understand that I would appreciate it if anything new was brought out, that you will apprise Mr. Collins so that if he wants to further inquire on those matters he may have an opportunity to do so.

Mr. Garrett: So understood.

JOHN LOVASCO

a witness called by and on behalf of the respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Garrett:

Q. Mr. Lovasco, when you had this conversation with Mr. Despol in which he told you that he had ways of taking care of fellows like you, where did that conversation take place?

A. It took place at the side entrance there at

(Testimony of John Lovasco.)

the O'Keefe and Merritt plant, half way between Olympic and employees' entrance.

Q. Did you thereafter attend any meetings in Mr. Collins' office at which Mr. Despol was present?

A. No, I did not myself.

Q. How many meetings in Mr. Collins' office did you attend, meetings at which Mr. Despol was present? [1500] A. One.

Q. You have already testified about what was said at that meeting? A. Yes.

Q. How long after that meeting was it that you had this conversation with Mr. Despol in which he told you that he had ways of taking care of guys like you?

A. I believe that it was about a week or ten days.

Q. Did you hear the testimony of Mr. Charlie Spallino as to the occurrences on the day of the election? Did you hear that?

A. Which election is that?

Q. The N.L.R.B. election.

A. I don't quite understand you.

Q. Were you present when Mr. Charlie Spallino testified as to what you did and what he did on the day of the N.L.R.B. election, that is, November 20, 1945?

A. Was I present here in court, you mean?

Q. Yes. A. I was present then.

Q. You heard his testimony, did you?

A. Yes.

Q. Did he have any written notes for the speech he made on that day at the Five and Over Club meeting?

(Testimony of John Lovasco.)

A. I had the note that I wrote up myself, and Charlie [1501] looked it over and he said he was not much of a spokesman and he could not recite what we had written down there, and he thought that he would get it all jumbled up and make a mess of it, so I volunteered to make the speech.

Q. Did you and he then leave the plant before you returned to the Five and Over Club meeting?

A. Yes, sir.

Q. Did either one of you require any permission to leave the plant? A. No, sir.

Q. Do you recall at the Five and Over Club meeting the substance of what Mr. Charles Spallino said to the membership, that is, the meeting on the day of the N.L.R.B. election?

A. I recall him opening the meeting, but I don't know exactly what he said because I was just thinking over what I would tell the boys on my speech. So I really don't know what Charlie Spallino stated.

Q. Do you recall who spoke at that meeting?

A. Yes, Charles Spallino and I.

Q. Was it a regular membership meeting of the Five and Over Club? A. Yes, sir.

Q. Was the floor open for anyone who desired to speak? A. Yes, sir.

Q. Did you speak there as a representative of the company [1502] or as a member of the A.F.L.?

A. No, I spoke there as a member of the Five and Over Club.

Q. At that time were you affiliated with or had you made application to join the A.F.of L.?

A. Oh, yes.

(Testimony of John Lovasco.)

Q. What union, the Stove Mounters?

A. Yes, sir.

Q. Is that the same union you had belonged to in 1936 and 1937? A. Yes, sir.

Q. Did you hear Mr. Spallino's testimony you were present at the meeting of yourself and Mr. Collins and Mr. Spallino, in Mr. Collins' office, at which Mr. Collins said something about going out and signing up certain members of the Five and Over Club, 25 old members and 25 new members?

A. I recall Spallino making that statement here, yes.

Q. Is that true?

A. I didn't hear that in Collins' office.

Q. Did you ever hear that said anywhere?

A. No, sir.

Q. Or did anyone ever tell you to go out and get 25 or 50? A. No, sir.

Q. Did you notice any change in Mr. Spallino's attitude toward the A.F.L.? A. Yes. [1503]

Q. Was that before or after he was defeated for re-election as president of the Five and Over Club? A. After he was defeated.

Q. Did he talk to you about that?

A. Yes, sir, we had a little talk about that.

Q. Where was that and when?

A. That was right in front of the lunch stand, just about a minute to 12:00.

Q. On the day of the election?

A. No, it was sometime after the election, about two days, two or three days afterwards.

(Testimony of John Lovasco.)

Q. I don't mean the N.L.R.B. election.

A. No, I mean the Five and Over election. That is what I am talking about.

Q. When was the Five and Over Club election, about?

A. I believe it was held the second or third week in December.

Q. Was there anyone present there when you were talking to Mr. Spallino besides you two?

A. No, just Charles and I.

Q. What did he tell you about the change in his attitude, if anything?

A. Well, he went on saying how the Five and Over Club members let him down, and that now that he is out of the Five and Over he says, "I will get even with some certain sons of bitches." [1504]

Q. Did he tell you who he referred to in that connection?

A. No, I asked him, I says, "Charlie, do you mean me? I happen to be a Five and Over member."

He says, "No, Johnny, I don't mean that for you."

I says, "I am glad that we understand each other there."

Q. Did he tell you he had a definite program for getting even with somebody?

A. That is right.

Q. Thereafter did he openly work against the A.F.of L.?

A. I don't recall Charlie ever working after

(Testimony of John Lovasco.)

that for the A.F.of L. He stated in his own words that he had been C.I.O. all along and he didn't give a damn who knows it now, and I says, "Well, I am sorry that you feel that way," I says, "in a way I am glad I found you out now."

Q. Were there two conversations which you were present at with Mr. D. P. O'Keefe at which his speech was mentioned, or only one?

A. I was present in Mr. O'Keefe's office, is that the question, with——

Q. Yes. Withdraw that.

You remember you testified yesterday that you were with Mr. O'Keefe when Charles Spallino handed him some copy and Mr. O'Keefe threw it away? A. That is right. [1505]

Q. That copy did not relate to the Five and Over Club speech that was made on the day of the N.L.R.B. election, did it?

A. No, that note or paper, whatever he handed Mr. O'Keefe was one that we was going to make up in the Five and Over clubroom, either Charlie or myself, and Mr. O'Keefe threw it in the waste-paper basket and said that he would make a speech to the employees the next day. That was on election day. I believe the speech was at noon.

Q. I see. And then that paper with the copy on it, which was presented to Mr. O'Keefe at that time, the day before the election, was that intended to be a speech or a pamphlet, when you and Spallino took it there to him?

A. We were going to distribute those out in

(Testimony of John Lovasco.)

pamphlets. But then Charlie didn't want to be out there.

I said, "Well, if we make these up in pamphlets, you and I will be out there to hand these out."

Charlie didn't want to be one of the men to hand them out, so I said, "We will make a speech of it."

Q. In any event, that copy which you handed to Mr. O'Keefe had nothing to do with the speech that was actually made at the Five and Over Club; did it? A. Oh, no.

Q. In 1937 and 1938, you testified yesterday that you recalled you had been an officer of some kind in the Stove Mounters Local Union [1506] at the plant. Isn't it a fact that you were on the shop committee?

A. Now, that you refresh my mind, I believe that is the truth; I was on the shop committee.

Q. Are you on any committee or do you hold any office in the Stove Mounters Local at the plant at this time? A. At this time, no.

Mr. Garrett: No further questions.

Q. (By Mr. Nicoson): With respect to this first meeting you had in Mr. Collins' office, where Mr. Despol was present, I believe you now testify you only attended one meeting; is that correct?

A. That is correct.

Q. When did that occur?

A. The exact date I don't know, but it was sometime the later part of December or the first part of January, the first week in January; somewhere in that neighborhood.

(Testimony of John Lovasco.)

Q. Was it your recollection it was after Christmas? A. Yes, it was after Christmas.

Q. Who was present at that meeting?

A. There was Mr. Collins, Mr. Despol, Mr. Fred Rotter, Joe Sanchez, Frank Doyle, myself and, oh, Joe De Rose.

Q. Now, were there two meetings when you had an A.F.L. committee present, with Despol and Collins?

A. Were these two meetings that night, you mean? [1507]

Q. No, were there two at any time.

A. Yes, I had representatives in both meetings, the first and second meeting.

Q. Was it the first one that you arranged that you attended, or was it the second one?

A. It was the first one, to my knowledge, that I attended.

Q. The first one that you attended?

A. That is right.

Q. And then the next time the A.F.of L. committee went up, as you term it, that was later, is that correct?

A. That is right. That was after I was threatened.

Q. All right. Now, what was said at that meeting and who said it? Just give us the whole thing as you now remember it.

A. Well, it was in that office over there, the people I have mentioned. Mr. Despol walked in. They all said hello, and Mr. Despol started saying,

(Testimony of John Lovasco.)

"Well, shall we go ahead with this contract?" Mr. Collins, I believe, made the statement that he doesn't know whether he has got a contract for him or not, and Despol wanted to know what he meant, and he says, well, it was that he had some little business with this Pioneer Company, they might take over the O'Keefe and Merritt product for them, and Despol remarked that he was kidding, and I believe Collins says, "No, that is truth." And then is when Mr. Despol said he [1508] saw where he made a mistake, that he should have had Pioneer on the election and in this contract.

Q. Is that what he said? A. That is right.

Q. Anything else you remember?

A. That is all I can recall now. Then they proceeded going through the contract.

Q. You say they did go through the contract?

A. They started going through the contract, yes. There were some they agreed to and some they did not.

Q. But that is all you can remember of what was said at that time?

A. No, there was one other, that there was quite a discussion there, that was maintenance and membership, and checkoff. There was a quite a discussion about that, and that is the one I was interested in, because Johnny wanted—wanted a closed shop. Then he was talking about——

Q. By Johnny, you mean Mr. Despol?

A. Mr. Despol.

(Testimony of John Lovasco.)

Q. We have two Johnnys here and I am trying to keep the record certain. A. That is right.

Q. Go ahead.

A. Then Mr. Collins started bringing up the wages and Mr. Despol stated he didn't want to discuss money matters before the boys. So later there was a discussion about [1509] Gaffers and Sattler's contract and I believe Mr. Collins mentioned one or two prices that he was sure of that they were getting over there, and he says he didn't want to talk money matters on this contract.

Q. Is that all you remember now?

A. Well, there was—when Despol—I don't know whether it was just before he got ready to leave or when, but he made the statement that if the Pioneer did take over he wouldn't take it laying down.

He said that they had been to a large expense of trying to organize the O'Keefe and Merritt plant, and that they might have to strike at it, at the O'Keefe and Merritt plant.

I believe Collins said then to keep it clean, they didn't want no strikes, and that he would have police protection out there for anyone that wanted to come through. He says, "Let's fight this thing out right and take it to court where nobody will get hurt."

I think Johnny agreed to do that. Then Collins said that he would take it up with his client, to see whether he could reimburse Johnny for his organizing expense.

There was one other thing. I believe Collins made the statement, he said, "If you keep the wolves

(Testimony of John Lovasco.)

away from the door," he says, "I will see my clients and see if they can reimburse you."

Q. Is that about it? [1510]

A. That is about all I can recall.

Q. How did you happen to go there in the first place, Johnny?

A. I found out that the contract had arrived at Mr. Collins' office, and I then went up and told Mr. Collins that if he didn't have anything to hide or anything like that, there was a large majority of A.F.L. membership out in the shop and we wanted to sit in on the meetings.

He, in turn, told me he didn't have anything to hide or anything to cover. He said, "You are welcome to bring up whoever you want."

Q. What I was trying to lead up to or get you to tell me was how you learned there was a contract presented?

A. I knew the contract would have to be delivered sometime, so whenever I saw Mr. Collins—I have occasion to go up there in the front office—and I would see Mr. Collins around there. I would ask him whether the contract had been delivered. He said, "No. No. No."

There was quite a time elapsed there. The contract hadn't got in. Finally one day it got in, so I told him then I wanted to attend the meeting.

Q. Mr. Collins told you he had been presented with the contract from the C.I.O.?

A. That is right.

Q. Did he also tell you that he had already had

(Testimony of John Lovasco.)

a meeting [1511] with Mr. Despol about the contract? A. No.

Q. Did you know that he had?

A. That he had had a meeting?

Q. With Mr. Despol about the contract, before you went up there with your committee.

A. I don't believe he told me anything like that, no.

Q. Well, the reason you didn't attend the second meeting, at that time the second A.F.L. committee went up there, was that because Despol scared you out?

A. Well, I wouldn't say exactly that he scared me out. But I have a little business of my own I do on the side, and I really had this meeting myself. There was some contracts that had to be signed, this partner and I. I thought, "Well, I will stay away this time and let—I will go around and pick out another group of boys to go up to this next meeting.

Q. You weren't afraid of Despol or what he could do with you?

A. When anybody makes a statement to me I just guard myself. I am not afraid of Despol himself personally, no.

Q. Pardon?

A. Not that I am afraid of Despol, personally, no; what he might do on the side.

Q. Now, let's get around to the time that you and Charlie [1512] went into Mr. O'Keefe's office with this leaflet or speech, or whatever you want to call it, and I believe you said at that time just three

(Testimony of John Lovasco.)

of you were present, Mr. O'Keefe and you and Charlie. A. That was the first.

Q. That was the one—

A. Is that the one you are referring to?

Q. The one that you were going to distribute, the one you just testified you and Charlie would have to stand out in front of the plant and hand out and the one he didn't want to hand out.

A. That is right.

Q. You remember that meeting, and there were just the three of you there, Mr. O'Keefe, Charlie and yourself, is that right? A. That is right.

Q. All right. Tell us what was said and done at that meeting, just everything you can remember.

A. That was the day before the election, and I asked Charlie to go up with me to Collins, to see what he thought about this here paper that we made up and see whether we was giving the boys the true light or whether we had made some mistakes in there, and we wanted to get that checked over. Mr. Collins would not interfere with it.

Q. What do you mean he would not interfere. What did he say? [1513]

A. He would not take sides, he would not even —in fact, he didn't even look at the paper. We stated that we had, Charlie and I, got this little speech or this pamphlet up to either distribute or make a speech out of it, and Mr. Collins found out what we was up to and he in turn said he would not have anything to do with it. Charles Spallino and I then came downstairs and went into Mr. O'Keefe's

(Testimony of John Lovasco.)

office and told O'Keefe what we had planned on doing, and Mr. O'Keefe did look at the paper, then he crumpled the paper and threw it in the waste-paper basket and said that he would make a speech to the boys the next day.

Q. Was there any discussion about the contents of that paper?

A. I don't believe there was any discussion.

Q. Mr. O'Keefe testified on cross-examination at page 1049 of the record: "Charlie submitted a paper to me with some reading matter on it. I read it and I said I didn't think it was the right kind of a speech to give, it might get us in trouble. I suggested that it be changed in some paces. After I made several suggestions I thought maybe it would be better if he should not make the speech as president of the Five and Over Club for fear anything he might say would be interpreted as reflecting the policies or sentiments of the O'Keefe and Merritt Company, so I told him just to throw it away, whatever I wanted to say to the boys I would say [1514] myself."

Is that substantially what occurred?

A. Yes. That refreshes my mind there.

Q. After having read that, is your mind also refreshed that Mr. O'Keefe did not crumple it up and throw it in the waste basket?

A. Yes, he did crumple it up.

Q. He did. Now, at another place in your testimony yesterday you were asked about the first time that you and Charlie went to see Mr. O'Keefe. Do

(Testimony of John Lovasco.)

you remember that occasion, in connection with the union matters, is what I mean. You testified about that yesterday, about two times.

A. Yes, that is right. There were two of them.

Q. The other time you went to see Mr. O'Keefe is the one I am questioning you about now. Is that clear in your mind?

A. Not right now. Just a minute. Yes, sir.

Q. Now, what was said, and were just the three of you there, you and Charlie and Mr. O'Keefe?

A. That is all I recall.

Q. All right, what was said there?

A. Charles Spallino went in to Mr. O'Keefe and asked Mr. O'Keefe what he thought the Five and Over Club should do to help win this election. I don't recall the exact words, but it was something that to this effect, that we should keep our nose clean.

Q. Anything else?

A. I can't remember at the present.

Mr. Garrett: Can I have that answer read, please?

(Answer read.)

Q. (By Mr. Nicoson): You already testified yesterday at page 1480 and also at page 1486 that at that time and place no mention was made of Mr. Collins' name. Is that still your testimony?

A. There was once, one time there that I recall that O'Keefe did say something about going up to see Collins. He did mention Collins' name. Now, I don't know whether it was the first or second

(Testimony of John Lovasco.)

speech, the first or second time we went to see Mr. O'Keefe. [1516]

Q. In respect to this occasion which we are now discussing, at page 1052 of the record, Mr. O'Keefe testified as follows:

"A. He asked"—when he says he, he is talking about Charlie Spallino—"He asked what he should do about encouraging or discouraging men from joining one or the other unions." Did you hear him ask that, did you hear Charles ask that question of Mr. O'Keefe?

A. You say that Charles asked Mr. O'Keefe that?

Q. Yes.

A. Well, would you read that over again, please?

Q. "He asked what he would do about encouraging or discouraging men from joining one or the other unions." This is Mr. O'Keefe talking, and when he said he, he was referring to Charles Spallino. Do you recall Charles making such a statement to Mr. O'Keefe?

A. To be truthful with you, I don't remember that.

Mr. Collins: You mean in those exact words, Mr. Nicoson.

Mr. Nicoson: No, the substance of it.

Mr. Collins: It doesn't sound like Charlie Spallino.

The Witness: That is right. Charlie doesn't speak like that.

Q. (By Mr. Nicoson): Do you remember

(Testimony of John Lovasco.)

Charles saying anything like that or anything to that effect?

A. What Mr. O'Keefe would do if any——

Q. What Charles said to Mr. O'Keefe. You two went into the [1517] office and Charles said something to Mr. O'Keefe? A. That is right.

Q. Is this what he said, or in substance is this what he said?

Mr. Collins: I object to that as having been asked and answered.

The Witness: I am sorry, I won't be able to give you a good answer on that.

Mr. Collins: I think it has been asked and answered on cross-examination.

Mr. Nicoson: We are trying to establish contact. He is trying to remember if anything like that was said.

Q. (By Mr. Nicoson): That is right, isn't it?

A. Beg pardon?

Q. You are trying to remember now if anything like that was said? A. That is right.

Q. Up to now you haven't said yes or no to it.

A. I said here that I didn't remember right at the moment.

Q. All right. Mr. O'Keefe also testified at page 1052 of the record, "I told him that I wouldn't give him any answer to that at all."

That is this same thing we are just talking about.

> "Mr. Collins had done business with both AFL and CIO. That I knew he represented different firms"—— [1518]

A. I get you.

(Testimony of John Lovasco.)

Q. ——"that had AFL contracts and CIO contracts, and he would be very familiar with the good and bad of either side, and for him to see him."

Do you remember that?

A. I recall that now, when you said "both AFL and CIO"; that is right.

Q. That occurred; didn't it?

A. That is right.

Q. Substantially as Mr. O'Keefe has here related?

A. That is right. I recall those words now.

Mr. Nicoson: No further questions.

Q. (By Mr. Tyre): How often do you hold meetings of the Five and Over Club?

A. I believe—I am just going to make a guess at that because I am not a very good member of the Five and Over. I believe it is the second Thursday of the month.

Q. How long has that been the practice to hold meetings on the second Thursday of every month?

A. Well, I wouldn't say that—I know as long as I have been there there have been meetings at least once a month for the Five and Over. Now whether it was that day or not I don't know.

Q. So far as you can remember now it has always been Thursday, though? [1519]

Mr. Collins: Just a moment. I object to it as calling for a conclusion of this witness; calling for an answer this witness is not qualified to give. It is in evidence this man has been in the Service for four years.

(Testimony of John Lovasco.)

Q. (By Mr. Tyre): Since you have been back from the service, so far as you can remember, since that time until today, the meetings have been on Thursday at least once a month?

A. I wouldn't—I said I believe they are on Thursday. If you want the truth I have never attended any meetings.

Q. Never attended any Five and Over Club meetings?

A. I went in there one night here just a short while ago. No. That was American Legion.

Q. That wasn't a Five and Over Club meeting?

A. No, American Legion.

Q. When did you come back from the Service?

A. I got back to O'Keefe and Merritt Company April 23, 1945.

Q. And you attended no Five and Over Club meetings from that date until today?

A. Oh, yes.

Q. What meetings did you attend?

A. Not the Five and Over. In the Five and Over Club room for the American Legion.

Q. Have you ever attended any Five and Over Club meetings since you came back from the Service? A. One.

Mr. Collins: Objected to as having been asked and answered.

Q. (By Mr. Tyre): Is that the meeting on November 20th, the day of the election?

A. That is right.

Q. What was on this paper that you showed to Mr. Collins when you and Charlie went up there the day before the election?

(Testimony of John Lovasco.)

Mr. Collins: That is objected to as improper cross-examination.

Trial Examiner Kent: He may inquire.

The Witness: To the best of my recollection it was the speech I was going to make myself, telling the boys what I knew of the AFL and how long I was a member and that all other stove companies were with the AFL. And at that time there was —I believe I had added in there for the fellows not to be afraid, there wouldn't be—that the CIO wouldn't cut our steel off.

Q. You mean the CIO wouldn't cut the steel off in case the AFL won the election?

A. That is right.

Q. What else was on that paper?

A. That is about all I can remember, just talked about a minute and a half or two minutes.

Q. This is the paper you showed to Mr. Collins, is that [1521] what you are just testifying about?

Mr. Collins: Objected to as assuming a fact not in evidence. The witness testified I wouldn't even look at the paper.

The Witness: Yes, that is the paper that Collins refused to look at.

Trial Examiner Kent: The record may remain.

Q. (By Mr. Tyre): When did you first see that paper?

Mr. Collins: Just a minute, Mr. Lovasco. When I make an objection, wait until the Trial Examiner rules before you answer it.

Mr. Tyre: Read that question back.

(The question was read.)

(Testimony of John Lovasco.)

Mr. Collins: That is objected to as calling for—I object to the form of the question as being ambiguous. Do you mean the paper or the writing on the paper?

Trial Examiner Kent: Reframe the question.

Mr. Tyre: I don't know how I could reframe it. I want to know when he first saw the paper. I will ask him about the writing later.

Trial Examiner Kent: I will reverse my ruling. You may answer.

The Witness: Well, the paper that I wrote on, that was the day before the election, that was the 19th.

Q. (By Mr. Tyre): Where did you get that paper? [1522] A. Off of a desk.

Q. Off your desk?

A. I said off a desk. I don't have a desk.

Q. Off what desk did you take it?

A. I think it was one of the inspectors.

Q. You wrote it out yourself? A. Yes.

Q. In longhand? A. Yes.

Q. In pencil or pen? A. Pencil.

Q. How many sheets was it?

A. Oh, I would say it was just a little over a sheet maybe, small sheet.

Q. Did you write this out on one sheet or two sheets?

A. No, I wrote it on one sheet, then I—this other part I put on the back of it.

Q. Did you show that to Charlie before you went over to Collins' office?

(Testimony of John Lovasco.)

A. Charlie was with me when I wrote it.

Q. Where were you when you wrote it?

A. This was over there by the inspection department below the deck.

Q. Was anyone else there when you wrote it?

A. Not that I recall. [1523]

Q. Just you and Charlie all by yourselves?

A. That is right.

Q. What time of day did you write it?

A. That must have been early in the morning. I would say about 9:30.

Q. What time did you go up and see Mr. Collins about that paper?

Mr. Collins: I object to it as immaterial, asking a man what time he went to do a thing six or seven months ago. It is the highest form of——

Trial Examiner Kent: Well, this is cross-examination. He may answer.

Mr. Collins: The most ridiculous thing I have ever heard of. He will ask him next what time he went to the bathroom.

Mr. Tyre: May I be excused just a minute? Apparently there is an urgent telephone call.

Trial Examiner Kent: Yes.

(Short recess.)

Trial Examiner Kent: The pending question was in substance what time did you go to Collins' office?

A. To be truthful with you, I don't know what time I went up there.

Q. (By Mr. Tyre): Was it in the afternoon or in the morning? [1524]

(Testimony of John Lovasco.)

A. I believe it was in the afternoon.

Q. Had you finished writing out this speech when you and Spallino broke up that morning?

A. What was that?

(Question read.)

A. Had I finished writing it up? Yes.

Q. (By Mr. Tyre): It was several hours later, you believe, that you and Charlie went up to see Mr. Collins about it?

Mr. Collins: Objected to as having been asked and answered. The witness has testified he don't know what time it was.

Mr. Tyre: I think the witness testified it was in the afternoon. Was I right on that, Mr. Lovasco?

The Witness: Yes, I testified it was in the afternoon.

Mr. Tyre: All right. I will withdraw the question.

Q. (By Mr. Tyre): Where was Charlie when you found him to take him up to Mr. Collins' office?

A. I don't remember.

Q. You went to him and told him that you wanted to go see Collins about this paper?

Mr. Collins: Objected to as irrelevant, incompetent and immaterial. I will stipulate he was in the factory some place.

Trial Examiner Kent: This is cross-examination, of course. The answer may be taken. [1525]

The Witness: What was the question again?

(Question read.)

A. Yes.

(Testimony of John Lovasco.)

Q. (By Mr. Tyre): What did he tell him?

A. The exact words I don't know.

Q. As best you can recall.

A. It was whether we was giving the boys a true story of what we was to speak about.

Q. No. I am talking about now what did you tell Charlie before you went up to Collins' office?

A. That is what I just told you.

Q. You wanted to know whether or not you were going to give the boys a true story?

A. Whether we had it written down right, that is it.

Q. Did you show Charlie this paper you had written out before you went to Collins' office?

Mr. Collins: Objected to as having been asked and answered.

Trial Examiner Kent: I think it has been pretty well covered. My recollection was he said he wrote it in front of Charlie.

The Witness: That is right, I did.

Q. (By Mr. Tyre): You did show it to Charlie before you went to Collins' office?

Mr. Collins: I object to that as having been asked and [1526] answered.

Mr. Tyre: I would like to know when he did show it, if he ever did.

Trial Examiner Kent: We will take the answer, to save time.

The Witness: Charles and I wrote the paper—I mean Charles was by my side when I wrote it. I don't recall whether I showed Charles the paper

(Testimony of John Lovasco.)

or not when we went up to Collins' office. There are a lot of things, too, I will say, like Charles Spallino stated here we didn't take down notes of everything that was done. We didn't know it was going to be complicated, if we did we would have been prepared.

Q. (By Mr. Tyre): With reference to this first meeting you attended in Mr. Collins' office, when Mr. Despol was present, when did Mr. Collins first tell you he already had the proposed CIO contract in his office?

A. Where did he tell me that?

Q. When.

A. The date I couldn't tell you. I asked him several times, "Has the contract come in? Has the contract come in?"

"No. No. No. No."

Q. Was it on the same day or was it a day before or two days before?

A. I couldn't truthfully answer you that one.

Q. You don't remember at all?

A. I don't remember when it come in.

Q. Did Mr. Collins tell you how many contracts he had? A. No, he didn't tell me.

Q. Did he give you a copy of the contract?

A. Not to me personally, no. But there was, I believe there was two other copies that was passed out among the committee there to look at. We kind of glanced over it. I was about the third stool over. I couldn't get to see much of it without breaking my neck; I didn't think it was worth it.

(Testimony of John Lovasco.)

Q. Were you there before or after Mr. Despol arrived?

A. I believe I was there before.

Q. How long had you been there before he arrived?

A. I don't know, but I went up there after the 4:30 whistle. I couldn't say how long Johnnie was on his way.

Q. More than 15 minutes?

A. I couldn't answer that, I wouldn't know.

Q. Who told you that this meeting was going to take place? A. Mr. Collins.

Q. When did he tell you?

A. Well, Mr. Collins and John Despol was out there with the sound truck and said something—the meeting with Collins. So then I knew it that way.

Q. Who said there was going to be a meeting with Mr. Collins? [1528] A. Mr. Despol.

Q. He told you that?

A. He not only told me, he told the employees over the microphone.

Q. What time did he say that meeting would be?

A. It would be at 4:30 in Collins' office.

Q. When did you get together this A. F. of L. committee?

A. When did I get them together?

Q. That is right.

A. I believe that same day, as I found out about the meeting in Collins' office.

(Testimony of John Lovasco.)

Q. What time was this announcement made over the loud speaker?

A. Well, their usual time out there is 12:00 o'clock.

Q. And that was the time that you heard it on the day the meeting took place?

A. I heard several times that he was going to go over the contract with Collins at 4:30. He stated that a number of times.

Q. You heard that several times? A. Yes.

Q. What other time when you heard it on the loud speaker system?

A. Oh, I couldn't say right offhand. He has been out there a number of times. The doggoned thing would break down [1529] once in awhile, the battery was haywire or something, but he did make that statement, that they was going to go over the contract with Collins.

Q. He made that statement at noon?

A. Yes, that is when he was there, at noon.

Q. You don't remember any other time that you heard the fact?

A. Yes, I heard another time, but I just can't recall the day that it was. But there was twice that I heard him.

Q. But that was for another meeting, though?

A. That is right, that is right, I believe it was twice. The doggoned outfit broke down there, the microphone, poor battery or something.

Q. Did Mr. Collins tell you to gather up any A. F. of L. committees to attend those negotiations?

(Testimony of John Lovasco.)

Mr. Collins: Objected to on the ground it is assuming a fact not in evidence. This witness has testified he came and asked permission to bring one up.

Trial Examiner Kent: The answer may be taken.

Mr. Collins: Object to it upon the further——

Trial Examiner Kent: The answer may be taken.

The Witness: Well, I asked him that. I wanted everything aboveboard. Then he says yes, he didn't have anything to hide, and he says, "Bring your committee up."

Q. (By Mr. Tyre): Did he say bring up your committee from [1530] the A. F. of L.?

A. He said, "Bring up your committee."

Q. You asked him if you could bring up an A. F. of L. committee though?

A. That is right. Members from the A. F. of L.

Q. Did he make this statement to you at any other time besides this first time?

A. No, not that I recall.

Q. Did you ask him if you could bring up a committee for the second meeting?

A. That was understood, at any of the meetings we would have there, there would be representatives.

Q. He stated that to you, you could have this committee at all the meetings?

A. Yes, that was the first agreement we made.

Q. Do you know that there were more than two meetings in Mr. Collins' office with Mr. Despol?

A. I think there were more than two meetings, yes. How many——

(Testimony of John Lovasco.)

Q. Do you know why you didn't have anybody present after the second meeting? A. Yes.

Q. Mr. Collins told you it would not be necessary to have a committee? A. No, sir. [1531]

Q. Who told you?

A. Beg pardon. What was that last question?

(Question read.)

A. Nobody told me.

Q. (By Mr. Tyre): How did you know?

A. I could—I was there at the first meeting, and what representatives I had there on the second meeting, I learned what went on at the second meeting and I took it upon myself that Collins was not trying to hide anything from us, and I thought we didn't need any more committees up there, but I could have had this committee just the same if I had had my doubts. I did have of Johnnie, but not of Collins. Despol, rather.

Q. These men told you after the second meeting that it would not be necessary for you to have a committee up there any more?

A. They never told me any such thing.

Q. What did they tell you?

A. Just told me what took place at the meeting.

Q. And you then told them that they would not have to attend any more meetings?

A. I didn't tell them that.

Q. What did you tell them?

Mr. Collins: Just a moment. Objected to as calling for hearsay, no showing any representative of the [1532] respondent was present at any of

(Testimony of John Lovasco.)

these conversations. Objected to as improper cross-examination.

Trial Examiner Kent: He may answer.

A. I told you I didn't tell the boys anything.

Q. (By Mr. Tyre): You just heard their report and you made no remarks, is that it?

A. That was good enough for me.

Q. Is that what happened? You made no statement at all to what they told you?

A. That is correct.

Q. How long have you been working for the O'Keefe and Merritt Company?

A. I believe I stated at the opening when I got on the stand here it was April 22, 1936.

Q. And Mr. Lovasco, you have been present every day during this hearing, have you not?

A. Yes.

Q. And you have been seated next to Mr. Collins at the counsel table, is that correct?

Mr. Garrett: What has that got to do with it?

The Witness: Sometimes I have, sometimes I have not.

Q. (By Mr. Tyre): You have been sitting there next to Mr. W. J. O'Keefe, isn't that correct?

A. I have been sitting by Mr. Durant.

Mr. Garrett: Objected to as incompetent, irrelevant [1533] and immaterial.

Mr. Collins: I object to that upon the ground it is incompetent, irrelevant and immaterial. It is an attempt to intimidate this witness and it is highly prejudicial on the part of Mr. Tyre, who I have ob-

(Testimony of John Lovasco.)

jected on numerous occasions as having no right at all to appear in any of these proceedings. I wish to state for the sake of the record that Mr. Lovasco is not sitting here by me. He has been sitting around there by the A. F. of L. attorney just as much as he has been sitting by me.

Mr. Tyre: That certainly will not be substantiated by the record. I am merely asking this witness a question. I think he is capable of answering it.

Mr. Garrett: What is the relevancy of it?

Mr. Tyre: I think the Examiner knows what the relevancy is.

Mr. Garrett: I object on the ground it is irrelevant I suppose the Trial Examiner will rule.

Trial Examiner Kent: He may answer.

The Witness: If you are referring to have I heard everything that has gone on, no.

Mr. Tyre: That wasn't the question.

Trial Examiner Kent: Maybe it will save time to repeat it.

Mr. Tyre: Yes. [1534]

Q. (By Mr. Tyre): Mr. Lovasco, there are two rows of tables in this hearing room? A. Yes.

Mr. Garrett: Same objection.

Trial Examiner Kent: He may answer.

The Witness: Yes, there is.

Q. (By Mr. Tyre): On one side is seated the Board and C.I.O. counsel and at the end of that table is seated Mr. Garrett, the A.F.L. counsel; is that right? A. That is right.

Mr. Collins: Objected to as immaterial.

(Testimony of John Lovasco.)

Q. (By Mr. Tyre): On the other——

Mr. Garrett: Let the record show I have been sitting next to Mr. Tyre throughout this hearing.

Mr. Tyre: That is correct.

Mr. Garrett: I don't stipulate either one of us has enjoyed it.

Mr. Collins: I offer to stipulate Mr. Charles Spallino and Mr. John Despol and Jerry Conway have been seated next to Mr. Tyre at different times during this proceeding.

Mr. Tyre: That is correct; I represent them.

Q. (By Mr. Tyre): You, Mr. Lovasco, have been seated at the opposite table where Mr. Collins has generally been seated during this hearing; is that correct? A. At times. [1535]

Q. At almost all times; is that correct?

A. At times, I said. I wasn't here at all of them.

Q. At all times you have been in this hearing room you have been seated at the opposite table from me?

A. That is right, on that side (indicating).

Mr. Tyre: That is all.

Mr. Collins: Any further questions?

Mr. Nicoson: I have no questions.

Redirect Examination

By Mr. Collins:

Q. Mr. Lovasco, this microphone you were talking about, was that something in the O'Keefe and

(Testimony of John Lovasco.)

Merritt factory, or was that on the C.I.O. sound truck? A. That was on the C.I.O. sound truck.

Q. The C.I.O. have occasion to come out there at noons on various occasions and make different announcements? A. Several times.

Q. I believe you testified on cross-examination a moment ago something to the effect that you and Mr. Spallino went into Mr. O'Keefe's office and Mr. Spallino asked Mr. O'Keefe what side the Five and Over Club should take concerning union activity, for election and so on, and I think you testified that Mr.—I think that the record that Mr. Nicoson read to you said something about Mr. O'Keefe said, "Go up and see Mr. Collins. He had dealings with both unions. Go talk to my lawyer, Collins"?

A. That is right.

Q. Something to that effect? A. Yes.

Q. Do you recall that conversation?

A. I do.

Q. Was there anything else you can recall that O'Keefe said to you at that time?

A. Just to go up and see his attorney Collins, that Collins had been dealing with the C.I.O. and A.F.L. for a long time and that he could give us the story on it.

Q. Did Mr. O'Keefe tell you at that time that he wanted either one of the unions in there?

A. No, sir.

Q. Did he tell you the other way, he didn't want either one of them? A. He didn't say that.

Q. When you came to see me, what did I tell you about unions?

(Testimony of John Lovasco.)

A. Well, you said that the company could not get mixed up with any of the unions, and that anybody could join whatever they wanted or do whatever they wanted.

Q. Did I say what would happen to anybody if they joined or didn't join a union? A. No.

Q. Did I indicate that any form of punishment would be [1537] handed out to anybody if they did or did not join a union?

Mr. Tyre: That is objected to as having been asked and answered.

Trial Examiner Kent: The answer may be taken.

Mr. Nicoson: Almost in identical words.

Trial Examiner Kent: How is that?

Mr. Nicoson: Almost in identical words.

Trial Examiner Kent: Read the question.

Mr. Collins: I will withdraw the question. That is all.

Mr. Nicoson: No further questions.

Trial Examiner Kent: Just what is your job in the plant, Mr. Lovasco? What do you do?

The Witness: I am expediter.

Trial Examiner Kent: Well, what is the nature of the duties of an expediter?

The Witness: Oh, I go out and buy things and try and rush production, that is, when we was in war, when we got back from the Service. And I was chief plant inspector at the time.

Trial Examiner Kent: There has been some testimony in the record about some office. What is that office?

(Testimony of John Lovasco.)

The Witness: I am glad you brought that up. Thanks. That is swell. I believe Charlie Spallino said something about a torture room. Am I wrong?

Mr. Nicoson: That is right. [1538]

The Witness: That so-called torture room—when I was with O'Keefe and Merritt, came back from the Service, why, I was made a chief plant inspector. At that time we had a number of Army and Navy and Air Corps inspectors. Every office downstairs and upstairs—I mean downstairs, was all taken. There was another room leading off on an upper deck there that used to belong to Tom O'Keefe.

I later had two more inspectors come in, and I didn't have no place to put them. I took them up to this so-called torture room, and I showed them if they would accept that for an office temporarily—and I had a phone put in there for them.

So then they told me that they would have to have a file in there, and I got a file in there for them. They didn't want to be responsible for the keys, so I had one key at all times, with their permission, and the other key was hidden where they could find it.

Mr. Collins: Did these inspectors work for you or were they employed by the government?

The Witness: They were employees of the government.

Mr. Collins: Were you at any time a foreman or supervisor?

The Witness: Chief plant inspector.

(Testimony of John Lovasco.)

Mr. Collins: Did you have any people working for you? I mean that you could hire or fire. [1539]

The Witness: Not at that time.

Mr. Collins: Have you at any time had any kind of a job around O'Keefe and Merritt where you could hire and fire anybody?

The Witness: I wish I did.

Mr. Collins: Answer the question.

The Witness: No.

Mr. Collins: Now, this job of expediting, what are you doing right now?

The Witness: Well, I am out expediting material, and I have also had a little sales of some machinery, dispose of some machinery.

Mr. Collins: This expediting job——

Mr. Tyre: Just a minute. May we have the witnes answer the question before the next question is asked?

Mr. Collins: I thought he was through.

The Witness: That is all.

Trial Examiner Kent: Yes. I think it is in line with his duties in the plant.

Mr. Collins: I thought he was through. Go ahead, if you have anything else.

The Witness: No, that is all.

Mr. Collins: This expediting job you are talking about, does that mean you get to fly in an airplane to New York City or Chicago, or something, or does it mean you get in your car [1540] and go out and get bolts or something that is short about the job?

(Testimony of John Lovasco.)

Mr. Tyre: That is objected to as leading. It is an improper way to ask questions. Counsel knows that is not the proper way to ask questions. Ask him what his duties are. It is time we had just a little bit of propriety in these questions and answers.

Trial Examiner Kent: Let's reframe the question.

Mr. Collins: Is there a ruling?

Trial Examiner Kent: Yes. Reframe the question.

Mr. Collins: Describe your duties as an expediter.

The Witness: Well, I go out and get material.

Mr. Collins: What kind of material?

The Witnes: Anything they might ask for.

Mr. Collins: Do you get it personally?

The Witness: We have a purchasing agent up there and sometimes things are a little scarce and hard to find, and I will go out and try and locate it if I can.

Mr. Collins: That means you get in your car and go after it?

Mr. Tyre: Same objection, Mr. Examiner. The witness is trying to describe his duties and counsel is continually interrupting him. I think the witness is perfectly competent to answer.

The Witness:: Naturally I go out in my car. I don't [1541] think I would want to walk 75 or 100 miles a day at times.

Mr. Collins: Will you answer the question? Do

(Testimony of John Lovasco.)

you take any airplane trips out of town or is your work confined to Los Angeles?

The Witness: Right now it is all in Los Angeles.

Mr. Collins: That is all.

Recross-Examination

By Mr. Nicoson:

Q. What were your duties as chief inspector, Johnnie?

A. Well, I had several precision inspectors under me that checked items as they came through on production lines. If there was anything that was rejected I would have to O.K. it and scrap it.

Q. Would you go around and see if the inspectors were doing their job properly?

A. Absolutely.

Q. If they weren't you would see they did?

A. Yes. In the plant and outside, because we had outside inspectors also, see.

Q. You would go out and check up on those inspectors? A. Absolutely; that was my job.

Q. When did you change from the chief inspector over to the expediter?

A. That was right—I would say about a month or a month and a half after the war had ended.

Q. About a month or a month and a half?

A. We had cleaned out the department and I had turned over all the precision tools to the tool crib.

Q. That was another war casualty, that job, and

(Testimony of John Lovasco.)

the work you were doing? Isn't that right? It went out with the war?

Mr. Nicoson: That is all.

Redirect Examination

By Mr. Collins:

Q. Mr. Lovasco, what was your job before the war started?

A. Well, I was out expediting before the war, also.

Q. Now, then, do we still have inspectors out there at the plant? A. Yes.

Q. You are not the chief of any of them at the present time? A. Not at the present time.

Q. On or about November 30, 1945, were you expediting then? A. Yes, sir.

Mr. Collins: That is all.

Trial Examiner Kent: As expediter did you have any men working under you?

The Witness: Since I have been back from the war, no; work for myself.

Trial Examiner Kent: You may be excused.

(Witness excused.)

Mr. Collins: Mr. Trial Examiner, I do not have any [1543] associate counsel. I deem it not professional conduct for an attorney to take the stand and testify in any proceeding for the reason it is against the rules of the American Bar Association, and as I understand it would then preclude me from arguing about my testimony or the effect of it, in compari-

son with anybody else's that might or might not conflict with it.

I believe there has been sufficient evidence as to what conversations took place between myself and Mr. Despol during working hours.

But I will offer to stipulate with the Board's counsel at this time, if I took the stand and testified, that I would testify substantially the same as the witnesses who attended the meetings in my offices, and that is, the witnesses Johnnie Lovasco and Doyle; and that as to what transpired at this Carl's Cocktail Bar, I would testify that that occurred after working hours at what I considered to be a social drink with a friend of mine, the same as I would some brother attorney in a trial after we are out of court.

And at that time I told him that if he would keep this thing down, just to a proceeding in the courts, keep it peaceful, keep it legal not have a lot of people having their heads beat in around about the plant, that I would see that my clients reimburse his union organization for their organizing expense he had mentioned in my office on prior occasions.

Mr. Nicoson: I am sorry that we can't stipulate.

Mr. Collins: Very well. The respondents rest.

Mr. Garrett: How shall we proceed hereafter, your Honor?

Trial Examiner Kent: What is that?

Mr. Garrett: What will be the order of proof hereafter? Who will you call upon next?

Trial Examiner Kent: Well, I think that any of the A. F. of L. counsel might proceed to put on some testimony.

Mr. Garrett: Come now the unions, parties to the contract, represented by me here, the Stove Mounters, the Carpenters, and the Moulders, and at this time move this Board as follows:

To dismiss this action insofar as it may affect the interests of any of these moving parties. These moving parties in this action, of course, are here to defend their contract which is here in evidence, which they allege has been entered into in good faith by the parties on both sides, from the effect of the complaint filed by this region of the National Labor Relations Board, which complaint we hold requires to be proved in all particulars by the Board by competent evidence, not only insofar as it may affect the interests of respondents and provide remedies against respondents, but also insofar as it may affect the interests of these moving parties and affect the attitude of this Board [1545] toward the validity of the contract.

We base our motion to dismiss, and naturally we are making this motion only for ourselves, for our own benefit, for our own contract, and we address it to matters affecting the respondents only insofar as those matters may affect the validity of our contract.

We make our motion to dismiss first upon the ground that this Board has no authority or jurisdiction to interfere with or in any way impair the obligations of our contract. We are familiar with cases in which orders of the Board have affected the enforcement and validity of contracts held to have been entered into between respondents in C cases

and unions found to be company dominated unions, and we would call the Board's attention to the fact that there is no evidence in the recording showing that any of these A. F. of L. Unions are company controlled or company dominated unions. Rather, I may say the evidence is all to the contrary. Both by stipulation and the effect of the evidence they are shown to be legitimate and bona fide organizations, independent in their actions and activities of any control or domination by any employer, and I think the Board will take notice in the sense of judicial notice that all of these A. F. of L. organizations are independent bona fide workers' organizations which have been in existence for a long time, each of them for much longer than this Board has been in existence, and throughout the life of this Board have been recognized as legitimate bona fide labor organizations.

The specific evidence in this case will further show that the Stove Mounters organization, in particular, is the only independent labor organization which ever tried to organize the workers of the respondent O'Keefe and Merritt for their benefit in the entire period from the formation of this Board up to and including at least the second week of the war, when we find some evidence of CIO evidencing some interest in the organization of the O'Keefe and Merritt employees.

The record of this proceeding shows that the A. F. of L. Union here, which has the largest share in this contract we are trying to defend, is the same Stove Mounters Union which has been working on

the organization of the O'Keefe and Merritt plant since 1936 or 1937, fighting the company there through all that time, filing charges here with this Board throughout that time in an attempt to prevent discrimination and discriminatory discharges and to protect their work of organization. All the evidence here in this case provides a clear inference that at least as to the Stove Mounters Union in the situation it is in with respect to the O'Keefe and Merritt operation, that the CIO is a mere interloper which attempted to hide behind the cloak of the war emergency to take advantage of the suspension of the strike and the boycott activities of the A. F. of L. during the war in an attempt to come into the plant and steal for itself the benefit of the organizing work which had been done by the American Federation of Labor Unions.

We urged that in the absence of any evidence that the labor unions, parties to this A. F. of L.-company contract are company controlled or dominated, this Board is without jurisdiction to strike down the contract, without jurisdiction to interfere with the performance by either party to that contract of its obligations under the agreement, and particularly without jurisdiction by attempting to excuse the company from complying or by directing the company not to comply, without jurisdiction to put these A. F. of L. Unions in a position where they themselves will be bound by the obligations of this agreement but prevented by this Board from requiring reciprocal performance by the company party to the agreement.

In that connection, I want to recall the Board's attention to the facts and the contract provisions which are pertinent. The difficulties imposed on A. F. of L. Unions so frequently in many cases, of which this is one, by the Board at various times and following various theories in enforcement of the Wagner Act stem probably from the ambiguity of certain portions of the Act itself, which may have resulted more from inadvertence than from design.

In the question of the determination of the appropriate unit and the appraisal of the union's interest in terms of that unit found to be appropriate, this Board has frequently followed policies which seem to penalize craft unions unfairly and to favor unions employing the so-called industrial form of organization also unfairly. It is quite apparent that unions having craft jurisdiction extending horizontally throughout an industry and beyond the particular employer in question and beyond his own industry into other industries, have a legitimate interest in the activities of an employer not exclusively dependent upon their membership or representation on the particular employer's particular payroll.

In this case we have a situation where unquestionably the ability of the A. F. of L. Unions to make a contract and their right to have a contract with this employer depends not exclusively upon their representation in his own plant, but upon the fact that the membership of these A.F.of L. Unions extends beyond this employer's plant into the construc-

tion and other industries where the employer must place his products and where they will not be placed unless the particular crafts in the construction industry, the A. F. of L. crafts in construction industry, have assurance that the members of their crafts employed in the employer's [1549] plant and the members of other unions affiliated with the American Federation of Labor have recognition in the employer's factory to the exclusion of the CIO members and members of no union at all.

In other words, our rights to have this contract with the Pioneer Electric Company rest, in our opinion, as much upon our membership and membership of these A. F. of L. and other A. F. of L. Unions in the construction trades which are required to handle the employer's material, as they do upon the membership of these and other A. F. of L. Unions in the employer's plant itself. That principle has always been the governing law of this state, and was reasserted in the so-called Smith and McKay series of cases finally decided in our Supreme Court in 1940, in which it was specifically held that the general interest of a union in an industry was sufficient to legalize and make just and proper their demands that an employer exercise and execute a closed shop agreement with them even in a case such as the Smith and McKay case where the union itself did not actually have any representation within the plant of the employer from whom the closed shop contract was demanded, and in the course of which demands the A. F. of L. Union was picketing the employer's premises.

I need only say that a strict application of the principle that the validity of a labor contract entered into [1550] between an employer and a labor union was subject to proof that at the time of the execution of the contract the labor union represented a majority of the employer's employees.

I need only say that strict application of that rule would result in the obvious practical effect that in certain industries there could be no valid labor contract and that in certain industries there could be no activities by any employer requiring labor in the course of their operations. I refer specifically to the contruction business, in which it is absolutely necessary for construction contractors who contemplate the doing of construction work, before they have any employees to work on the job, before they even make a bid in order to secure the job, to secure a labor contract from the appropriate American Federation of Labor Unions in order to be able to bid to see whether they have a job or not, because in order to do that they would have to know that they are going to have a secure and assured labor supply and secure and assured labor relations, at the risk that failing to do that the contracts may not thereafter be consummated and their bonds be forfeited.

Mr. Collins: Mr. Garrett, will you excuse me a moment? Much as I hate to interrupt your dissertation and much as I enjoy it, as we have often said before, the witching hour of recess has now arrived.

Mr. Garrett: I wonder if I could just finish that

point. [1551] It will take me just a second, and I will conclude my first point.

Trial Examiner Kent: Yes, you may.

Mr. Garrett: I say, therefore, that I believe there exists room side by side with existing policies of this Board for the application of the general principles of contracts to the extent that where, as in the construction industry, the exigencies and the necessities for the procedure are quite apparent, I believe there exists room for the principle that where contracts are executed by independent uncontrolled labor unions and employers in good faith on each side, that those contracts are entitled to receive from this Board the respect to which the provisions of these contracts are entitled under specific provisions of the United States Constitution, and that the Board should not interfere with the execution of such contracts.

I further desire to call your attention, in closing on this point, that if it were not for the fact that the Board gives general credence to contracts executed in good faith between independent and uncontrolled parties on each side, labor organizations on one hand, and employers on the other, if it were not that that principle is being followed, we would have a state of turmoil in the construction industry of this country under which it would be impossible for any contractor to bid or begin operations. I call attention of [1552] the Board to the analogy of the situation in these particular cases where we have an employer affected by the conditions of the construction industry, subject in the past and in the fore-

seeable future to an A. F. of L. boycott throughout the retail trades, throughout the construction industry, and where we have an employer beginning to engage in business needing immediately access to a vastly increased labor supply and needing to secure that supply of labor from the membership of the American Federation of Labor Unions for two reasons; first, because that available labor supply in and by iteslf is in the membership of the American Federation of Labor Unions, and, second, because only by securing much of that labor supply from American Federation of Labor Unions can the employer continue to make his product available for sale and installation through the A. F. of L. organizations of the building trades.

That is all I have to say on the point of jurisdiction.

Trial Examiner Kent: Well, I understand you wish to continue with your motion following the noon recess.

Mr. Garrett: I would.

Trial Examiner Kent: We will adjourn until 2:00 o'clock.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 2:00 o'clock p.m.) [1553]

After Recess

(The hearing was reconvened at 2:19 o'clock p.m.)

Trial Examiner Kent: You might proceed.

Mr. Garrett: My second ground is that the AFL Unions had a right to contract with Pioneer Elec-

tric, irrespective of anything that may have been done by O'Keefe and Merritt.

The evidence is that Pioneer Electric was not a new entity formed out of the old one of O'Keefe and Merritt, but that the two at all times since 1942 have been separate, more or less distinct, and coexisting entities. The significant thing about this coexistence as separate entities during the period of more than three years preceding the National Labor Relations Board election in the O'Keefe and Merritt Company is the fact that all the parties here had notice thereof. When I say all the parties here, I refer not only to the respondents, the O'Keefe and Merritt Corporation and the Pioneer Electric Company partnership, but also to the AFL Unions, the CIO Union and the National Labor Relations Board, itself, which, in this case, is acting at the instance of and more or less for and on behalf of the CIO Union.

I make that statement because the situation is not one in which the Board intervenes in order to secure to the employees of the company responsible and responsive [1554] representation through a labor union. That has already occurred in this case.

The employees of the Pioneer Electric Company obviously have responsible and competent representation in their relations with their employer through the A. F. of L. Unions under whose employment contract they are working.

The Board is in this particular case obviously, because it is the feeling of the Regional office of the Board that in place of the present responsible

and independent and uncontrolled AFL union representatives there should be substituted a CIO representative in its place and stead, which I presume the Board feels will be similarly responsible, responsive and uncontrolled by the employer.

It isn't in this case, so far as the Regional office of the Board is concerned, the question of getting that kind of representation for the employees of Pioneer Electric Company. It is a question of substituting, if possible and if their aims are achieved, the CIO for the AFL.

Now, the Pioneer Electric Company in the period I have mentioned, that is, the period roughly beginning with the start of the war, was, as is shown by the evidence in this case, openly notoriously operating the machinery, the lease, payroll, employees contracts, products. And this fact was as open and notorious to the CIO and the National Labor Relations Board as it was to the American Federation of Labor. [1555]

It ought to be axiomatic, it seems to me, that in dealing with the National Labor Relations Board, petitioners for representation ought to deal in good faith. The petitioner who wants the employees of A and B to be incorporated in what he represents to be an appropriate unit, should not be allowed to come here and say, "I want the employees of A Corporation plus the employees of B Co-Partnership, but I am only going to put down in my petition that I want the employees of A Corporation, so that then the employees of the B Partnership will not be able to vote and effect determination of their

representative, but after I have filed a petition for representation of A Corporation I will then escape the necessity of allowing the employees of B Co-Partnership to vote, by coming back to the Board on a charge case and saying, 'Why, I meant A plus B employees all the time, although I forgot to put down the B, and I want you to fix me up on a charge case for what I didn't fix up for myself in a representation case.'"

Now, that is exactly what has been done here. A kind of an estoppel, it seems to me, ought to be declared against the activities of the CIO organization which came here on an R petition knowing that there were two separate entities which might be affected, chose one and ignored the one, through intention or oversight, and now attempts ex post facto to have an adjudication made as to representation of an [1556] employer whom the petitioner did not include in his choice of barganing unit but which the petitioner sedulously and purposefully excluded.

Now, Mr. Despol and the CIO come to the Board now and say in effect, "I want to eat my cake and have it too. I want to exclude the Pioneer employees for an election and get them here in a left-handed behind-the-back method, and that is exactly what this charge is brought here for. That is the purpose of the charge. The filing of this charge is one step in the scheme and plan which the CIO instituted with the filing of the original R petition on which an election took place in November, 1945. This is the second bite they are taking in the apple,

and I say that the Board should say that if they did not have either the courage or the inclination to seek to obtain representation in the first place by declaring the unit which they really wanted, then in that event they should be precluded from obtaining representation by this kind of a plan, which is a double-barrel scatter gun plan if I ever saw one. They should be precluded from obtaining representation over people whom they never declared their intention to represent and upon which representation they did not permit those people to vote.

It has already been pointed out that the partnership and corporation were not only actually separate through having different ownership—I think that officers and [1557] stockholders of the corporation have been shown to have a 30 per cent interest or less in the partnership—but they were dealing with each other at arms' length in the matter of leases and contracts. But the important thing has been, that separation has been open and notorious since the beginning of the war. It has been open and notorious to every employee of either corporation, A. F. of L. or CIO, since the beginning of the war. The employee of O'Keefe and Merritt who got hurt made his claim against O'Keefe and Merritt as a self-insurer in Workmen's Compensation matters. The employee of Pioneer Electric who got hurt made his claim against a private insurance company under a separate policy of insurance for Workmen's Compensation purposes. The employee of O'Keefe and Merritt had his Social Security and withholding tax deductions made by O'Keefe

and Merritt. The employee of the Pioneer Electric had his Social Security and withholding tax deductions made by Pioneer Electric. In unemployment matters, the employee of O'Keefe and Merritt drew his unemployment insurance from a separate fund set up in the account of O'Keefe and Merritt Company. In unemployment insurance matters an employee of Pioneer Electric drew his unemployment benefits from a different and separate unemployment insurance benefit account set up in the name of the Pioneer Electric. [1558]

The employee of O'Keefe and Merritt week by week got his pay by way of a check, which was signed O'Keefe and Merritt Company, a corporation. The employee of Pioneer Electric got his check week by week signed by Pioneer Electric Company, a co-partnership.

For a great period of time involved the employees worked on separate sides of a physical partition, which was maintained in the common property owned by one of the entities and held by the other under a leasehold interest.

The actual radiant of employment between the two concerns varied. At times the one concern had the greater number of employees. At times the other concern had the greater number of employees. The situation at the present time in Pioneer Electric has been that it has a much greater number of employees than O'Keefe and Merritt, which is not the situation which has obtained at all times. In past years and since the beginning of the war, on various occasions, that position has been reversed

and O'Keefe and Merritt have had a larger number of employees. Then Pioneer Electric has had a larger number of employees. Then O'Keefe and Merritt has had a larger number of employees. Then Pioneer Electric has had a larger number of employees.

What labor organization, trying fairly to determine the representation of both groups of employees, can be allowed to pick any particular time and direct representation [1559] petition that one or the other of these two concerns can claim thereby he has found both of them?

Now, it seems to me that in effecting a contract with an employer, entering into it with good faith, because he represents the overwhelming majority of his employees, no labor union should be put to the impossible task of solving a legal conundrum involving factors of the employer's past, his future, the way he came to have his business, the way he came to have his equipment, the way he came to be occupying the premises he has, the way he came to have the contracts that he has, the way he came to be carrying his compensation insurance in the way he has, the way his unemployment accounts are handled in the way they are, the way his accounting matters are handled in the way they are.

It ought to be enough for any labor union which represents the employees of a given employer to be able to see that that employer is operating apparently as an entity; that he is paying all his employees with the same kind of pay check; he is covering them all with the same kind of compensation insurance;

That he has them all in the same Social Security pool; that he makes leases just as if he were an independent contracting entity; that he makes contracts as if he were a free and independent contracting entity; that the majority of his ownership is in the hands of persons who are independent of interest in any other person, firm or corporation; that a rival union has treated him as being separate from any other person, firm or corporation; shouldn't that be enough?

How far is this Board going in attempting to impair the obligations of contracts which the courts of this state have been adjudicating since we have had a legal system here, and adjudicating rather satisfactorily, on the whole, to all the parties to those adjudications? How far is the Board going to go in laying aside or trying to interfere with our formal rules of the parties and the freedom of parties to contract and be bound by the benefits of obligations of contracts? How far is it going along the line the prosecution here apparently is demanding it go in putting elements in the execution of contracts to make it absolutely impossible for anybody to determine whether he has a contract or not? [1561]

Now, the A.F.L. unions have a contract with the Pioneer Electric Company. They expect to live up to that contract. They have a contract with the Pioneer Electric Company that the courts of this state are going to make them live up to, no matter what the National Labor Relations Board says about it.

The Pioneer Electric Company has a contract with the A.F.L. unions that we expect to ask the Pioneer Electric Company to live up to, and we expect if they don't live up to that contract, either as a result of their own free will or of forces of influences that come out of this case, we expect to ask the courts of this state to have them live up to them.

They have a contract that cost us something to get. They have a contract that cost us seven continuous years of hard work, boycotting the industry, broken heads and broken hearts, if you like, effort and so forth to get, money to get.

We never asked the company to give us back any of that money, either. We never asked to pay them, we never asked them to pay us anything, except the legitimate fruits of our efforts, not money into our hands. But their signatures on a contract which both parties to that contract would respect and both parties to that contract have a right to ask that the National Labor Relations Board permit them to respect [1562] their obligations thereunder.

Summing up my second ground there, I would say that, to summarize it, the Board ought to take cognizance of the fact that the party in whose behalf it is acting, the C.I.O.—and I say that with all respect to the Regional Board here, because I know the rules by which they are guided—I say it is obvious, as I said before, they are acting in behalf of one group of labor organization, the C.I.O. group, who are interested parties on the labor side of this

case. They are acting in behalf of that organization and not on behalf of the United States or the employees, if you please, because it can't be said that any greater benefits will result to the employees or the peace and dignity of the United States or the enforcement of the Act through the representation of the employees by the C.I.O. than would result from the present representation by the A.F.L. Both labor groups are independent, not company dominated unions.

From each of those labor groups the employees of the company may expect and receive bona fide representation. So, as I say, the Board is here on behalf of an interested party, trying to adjust a dispute. Not between the rights of the employees and the company; not an adjustment of the interests of the employees to what is due them under the law; but a substitution of the C.I.O. for A.F.L. representation.

I say that therefore the Board, the Regional Board, [1563] acting for and on behalf in this case purely of an interested labor organization, for the purpose of substituting it for another which occupies the same status before the law, as a bona fide labor organization, the Regional Board is representing a client or a charging party here which is estopped. The Regional Board ought to be considered as being estopped to violate the obligations of the existing A.F.L. contract. That estoppel rests upon the facts clearly apparent from this record, that the party represented here by the Regional Board, the C.I.O., had full notice at all times of the

separate, independent existence of the Pioneer Electric Company, separate and apart from the O'Keefe and Merritt Corporation;

That having that knowledge it chose to create an issue based upon representation of the O'Keefe and Merritt Corporation only; that having that knowledge it chose to and did exclude the Pioneer Electric Company and its employees from that question of representation;

That all other parties having the same knowledge as the C.I.O. relied upon the representations so made by the C.I.O. as to its intention and acted thereon;

And as a result of the representations made by the C.I.O., with full knowledge of the facts that as a result of the actions taken by the C.I.O., with full knowledge of the surrounding facts, the other parties involved, that is, the [1564] A.F.L. unions, relied on those representations as being determinative of the C.I.O. intentions, and were moved and influenced thereby.

They acquiesced therein to the extent of the exclusion of the Pioneer Electric Company from the representation question. And having been thus the recipient of representations, having relied on those representations in good faith, having moved and acted thereon, all such representations having been made by the C.I.O. and acquiesced in by the Regional Board, the A.F.L. unions, Pioneer Electric Company, their contracting party, cannot be now placed in a position where, to their detriment, they will find adjudicated a question which we deliber-

ately excluded from adjudication by action and representation and reliance of all the parties upon which the Pioneer Electric Company and the A.F.L. unions relied.

If you ever saw a clear case of estoppel, this is it. The C.I.O., the Regional Board, are clearly estopped on the basis of all the facts in this case from asserting that the representation rights of the Pioneer Electric Company were ever adjudicated, were ever precluded, or that the rights of the A.F.L. unions with respect to the Pioneer Electric Company were ever determined in any manner by an action of the Board, by any action of the C.I.O., by any election or anything else. [1565]

Now where does that bring us?

Now, third, if the Pioneer Electric Company stands in that position with that separate entity, as far as I can see, the A.F. of L. unions have a right to do everything they might properly do to secure the right to represent the employees of the Pioneer Electric Company. They had a right to continue as they did to attempt also to secure the right to represent the employees of the O'Keefe and Merritt Company, election or no election, and the A. F. of L. unions are going to continue to attempt to secure the right to represent the employees of the O'Keefe and Merritt Company, and the A. F. of L. Unions are going to do that only by attempting to get the employees of the O'Keefe and Merritt Company, of which there are now and will be in the future a substantial number, to voluntarily consent to be represented by the A. F. of L. unions, but the A. F. of L.

unions will also continue with respect to the O'Keefe and Merritt Company to exercise every form of legal coercion they can possibly exercise, both upon that company and its employees, through maintenance of an unfair list and boycott upon the company's products, to bring about a situation where on the one hand the company will be required to bargain and contract with the A. F. of L. unions and on the other hand the employees of the O'Keefe and Merritt Company will be compelled to join with the other working people interested in the sale and setting of their [1566] product, in membership in the A. F. of L. unions.

Now, it is quite apparent, as I say, that the efforts of the American Federation of Labor continued, and in my opinion they continued legitimately, toward the organization of the O'Keefe and Merritt Company after the election just as they continued continuously from the year 1936 up to and including the time of the election, short of the time when the A. F. of L. unions were respecting their obligations imposed by the war time emergency.

Now, as a result of that situation, as far as the record in this case goes, at the present time the C.I.O. is negotiating for, has negotiated for and probably will continue to negotiate for a contract with the O'Keefe and Merritt Company. The A. F. of L. unions have not since the time of the election negotiated for such an agreement. The C.I.O. complains that it has had some difficulty with the company in effecting the agreement they want with the

O'Keefe & Merritt Company. As to what difficulties they have or how great or how little they are, the A. F. of L. unions have no concern. Whether the A. F. of L. unions get a contract with the O'Keefe and Merritt Company or not, the O'Keefe and Merritt Company is going to stay on the A. F. of L. unfair list until it come into contractual relations with the American Federation of Labor. But with respect to those difficulties the A. F. of L. has no concern and neither does the A. F. of L. have anything to do with their making. What happens between the O'Keefe and Merritt Company and the C.I.O. has in our view of the situation nothing to do with the issues in this case, as far as they affect us. Insofar as the issues in this case affect us, we stand here upon this state of facts: Our organization among the employees of both companies continued up to the time of a consummation of a contract on January 31, 1946. At the time of the consummation of that agreement the A. F. of L. unions had given the company, that is, the Pioneer Electric Company, satisfactory evidence of majority representation in the employees of the Pioneer Electric Company and those who were about to become their employees. The evidence shows, and this is not for us to prove, in our view of the situation, we are not here under the obligation of defending a contract which is good upon its face, made concerning a legal subject matter between parties competent to contract and make the contract in all of its terms; we are here with that contract, and if it is void, it is up to the Board to show wherein. But the evidence in

this case, brought out by the Board itself, although it is not affirmatively necessary for us to show that we had capacity to contract, the evidence in this case brought out by the Board itself shows that the A. F. of L. union did all that is necessary for any labor organization under the rules of the Board itself to make a contract with an employer. The representatives [1568] of the various A. F. of L. labor organizations went in to the offices of the company, at the meeting which Mr. Durant attended in Mr. Collins' office, and they were there claiming majority representation. They had their membership records there. They said in effect, "All your employees are ours, we represent them all, all those people you are going to transfer are ours, they are our members, here are the records, look them over. Mr. Durant referred them to Mr. Collins and Mr. Collins presumably looked them over, and Mr. Collins advised Durant in the presence of all the parties that he was satisfied that the representation claims of the A. F. of L. representatives were true and correct. Upon that basis the parties contract.

Now, that brings me to my last point, 4, unfair labor practices. There are two kinds of unfair labor practices at issue here. The complaint is very carefully and artificially drawn so as to confuse the actions of the Pioneer Electric and the actions of the O'Keefe and Merritt Company, but the fact of the matter remains that all bargaining taking place in the period covered by the complaint falls into two classes: Bargaining by the O'Keefe and Merritt Company with the C.I.O., which has not resulted in

a contract, and bargaining by the Pioneer Electric Company with the A. F. of L., which has resulted in a contract. With the difficulties that the C.I.O. has had in bargaining since the [1569] Pioneer election with O'Keefe and Merritt, as I say, the A.F.L. unions have no immediate concern, nor have they any immediate agencies in those difficulties. The outcome of that bargaining, of course, is a different matter, but it has had no outcome at the present time, and whether that bargaining ever would or could affect the status of the O'Keefe and Merritt Company on the A. F. of L. unfair list is a question about which I have very definite ideas, but it does not enter into the question to be solved here.

The fact, therefore, is that this case splits into two independent parts, with one of which the A. F. of L. is not concerned on this record. As to what has happened in the case of the C.I.O. bargaining with O'Keefe and Merritt, that is a matter which we have no concern in and with which we will have no concern, either now or in the future, and which should be excluded from the consideration of the Board of the allegations in this case. If the C.I.O. has failed to make a contract with O'Keefe and Merritt, well and good. If the C.I.O. has made a contract with O'Keefe and Merritt, that also has no bearing on the question of the A. F. of L. contract with Pioneer Electric. If certain financial misunderstandings occurred between the C.I.O. and the O'Keefe and Merritt Company which were the outgrowth of their bargaining concerning a contract, that likewise is a matter which is not binding upon

the American Federation of Labor, [1570] of no concern to the American Federation of Labor, of no concern to the American Federation of Labor, and I might say of very little concern to the Board. The things that concern us are the question of whether or not we should be precluded from making a contract with Pioneer Electric Company when we were on the face of the record not a company controlled or dominated union, by an adjudication through a consent election, if that is an adjudication, made with respect to the O'Keefe and Merritt Company. I have already considered that, so that brings me to the last point, and that is this: Are we precluded from making a contract with the Pioneer Electric Company by alleged unfair labor practices committed by the O'Keefe and Merritt Company, as alleged in this record, allegedly against the C.I.O. organization, the same C.I.O. organization which filed a petition excluding the Pioneer Electric Company but including the O'Keefe and Merritt Company, all of which things, as you recall, occurred prior to the determination involved in that election.

Now, it seems to me that the effect of any unfair labor practices of the O'Keefe and Merritt Company against the C.I.O., if there were any, which I do not concede the record shows, it seems to me that the effect of any such unfair labor practices, if any occurred, should not be carried over beyond the period of an election which apparently determined the question of whether or not those unfair labor practices [1571] had or had not been effective and from there on carried over into another con-

tract with another business, made by another union, at a point in time much later than that involved at O'Keefe and Merritt.

Now, it seems to me that the effect of an unfair labor practice has got to stop somewhere. If unfair labor practices of O'Keefe and Merritt Company were involved, as pertaining to the only issue that the C.I.O. had or had any right to have, the issue outlined in their representation petition, the issue of who is going to represent the O'Keefe and Merritt employees, that those unfair labor practices could not carry beyond the election at O'Keefe and Merritt, because the election terminated in favor of the C.I.O. organization. After that if you have got anything you have the refusal to bargain with the C.I.O. on the part of O'Keefe and Merritt, a matter in which as I have stated the American Federation of Labor has no direct interest.

Now, to recall the Board's attention to the difference in the evidence as to the alleged unfair labor practices as opposed to the refusal to bargain which affects only the C.I.O., look at the record and see what are the alleged unfair labor practices alleged before the election are and what the unfair labor practices alleged are after the election.

You will find from the record that all the unfair labor practices alleged, all the unfair labor practices involving [1572] the company alleged, occurred before the election.

We come to the period following the election and what do you have? You have the entirely unsupported statement of Charles Spallino that Lovasco

continued to work with a committee on behalf of the A.F.L. in the plant after the election. Just what sort of an unfair labor practice is that on the part of the A.F.L.? None whatever. What sort of an unfair labor practice does that constitute on the part of the employer? None whatever, on the evidence in the case, unless this Trial Examiner is able to adduce from evidence not here presented that in some mysterious way Mr. Lovasco was the company.

Certainly, if Mr. Lovasco was the company he would certainly be far less the company than a member of the American Federation of Labor, whose connection in that respect dates back to the year 1936 or the year 1937. What would be more natural for him, in view of the unsuccessful outcome of the election, than to continue to work for the side that apparently, by his previous actions, he proved he thought were right? Did he have to leave the C.I.O. in control of that situation forever? Obviously he thought not, and I think the law does not require that he should make any such omission.

Now, there is an entire absence of evidence of unfair labor practices, as far as I can see, which would cast any [1573] cloud on or impinge the validity of the American Federation of Labor contract. The parties to that contract were competent to make it. They were competent to contract with each other. They were competent to contract with other people.

I will say again, at the risk of very great repetition, that there isn't a scintilla of evidence in this case, nor can anyone in this hearing stand up and

sincerely say that there is the slightest degree of company domination or control on the part of either of these companies involved, reaching into or involving any of the American Federation of Labor unions involved.

So, as I say, they are parties competent to contract. They are parties that have gone through the procedures which are usual and proper to these cases.

Mr. Collins: Mr. Trial Examiner, I was under the impression we would be through here in about 30 minutes when we reconvened. The hour is 3:15. I made an appointment to appear in one of the courts of this county. I will have to excuse myself.

I don't believe there is going to be any matters that will be raised material to my clients not already gone into. I would like to, at this time, however, renew my motion to dismiss on behalf of both the Pioneer Electric and O'Keefe and Merritt, which you granted the permission to resubmit at the close of the case. [1574]

I would like to renew all my motions to strike various portions of testimony that were not connected, pursuant to your permission granted at that time to renew the motion at the close of the hearing.

I would also like to move at this time, in view of the length of the record, which, I believe, will be over 2,000 pages, I would like to have a reasonable time—and that would be more than the 7-day period allotted—in which to file my brief, a written brief in this matter.

I think it would be and would take at least a month to go into this matter and cite the authorities and review the evidence and write a brief.

Trial Examiner Kent: I might state it is the general purpose of the Board to attempt to get out intermediate reports within 30 days of the close of the hearing.

In view of that, I might state I am reasonably certain I won't be ready with my report within 20 days, to get it in final form. If you would get the brief in by 20 days, I certainly will consider it and be glad to.

Mr. Collins: Very well.

Trial Examiner Kent: I wondered if the parties wanted to engage in general oral argument, other than this. Yours has been in the nature of argument, Mr. Garrett.

Mr. Schullman: I have a short motion.

Mr. Nicoson: I am willing to waive argument on the [1575] merits, if the other parties will.

Trial Examiner Kent: Before you go there is one question, Mr. Collins, I wanted to ask of Mr. Tyre and Mr. Nicoson. How about the Teamsters?

Now, the Teamsters seem to be employees of this, according to the uncontradicted testimony of Mr. O'Keefe, Jr., as I remember it, of this Service Incorporated. Now, Service Incorporated, not having been named in the representation petition, I wonder if the company or——

Mr. Nicoson: Nor represented here in any capacity.

Trial Examiner Kent: How is that?

Mr. Nicoson: Nor represented here in any capacity.

Trial Examiner Kent: I wonder if the company thinks, for my own information, if they could be certified under the petition as filed. If the C.I.O. could be certified under the petitions filed for those teamsters. There is another classification of men, service men who were not primarily teamsters. They do operate pick-up trucks and go out on repair jobs.

Now, I don't know what the payroll would show. I haven't examined it in detail. But I wonder if they wouldn't appear on the payroll as service men rather than teamsters or truck drivers. But that seems to me to be a serious question. I would like counsel to consider that.

Mr. Nicoson: I don't think there is anything serious [1576] about it. The complaint alleges they are in and we have evidence to show they are in, and we stand on the complaint, we stand on the evidence.

Trial Examiner Kent: Very well. I will have to assume the burden.

Mr. Collins: I take it there will be no oral argument, and we will have 20 days from the close of this hearing to get in the written brief?

Trial Examiner Kent: Yes. In view of the length of the proceeding I think it is a fair request, and I will grant that.

Mr. Collins: Thank you.

Mr. Garrett: Now, obviously, if an effective contract, made between parties competent to contract, such as the A.F.L. contract in this case is, if an

attempt is made to either strike it down or impair its enforcement here, it must be on one or two theories.

One theory is that the union, otherwise competent to contract and enforce its contract, fails to meet a requirement of the Wagner Act with respect to its representations of the employees of the contracting employer.

On that point I have already referred to the evidence produced in the Board's own case, which would seem, at least to my mind, to indicate that in the ascertainment of the representation of the A.F.L. union the parties went through [1577] the proper and usual procedure and all that is required of them.

But, on the other hand, I wish to call your attention to the fact that if there is any burden of proof to be sustained in the matter of striking down or impairing the validity of our contract on that score, the burden of proof is upon the Board to affirmatively show lack of representation, either actual or constructive, and not upon the A.F.L. unions to rebut any presumption of lack of representation.

As I say, I think the Board's case sufficiently shows that at the time of the contract the A.F.L. unions had all the employees and so satisfied the employers and were there with their evidence.

If that isn't the fact and the Regional Board relies on that point, I think it is up to the Board to sustain the burden of proof of lack of representation, particularly with respect to the matters of proof which are in the Board's own records.

There seems to be another way in which the Board attempts left-handedly to arrive at the same result, and that is to claim that new matter, whether or not the contracting A.F.L. union, A.F.L. union in this case, had or has a majority of representation, had or has practically 100 per cent representation, that that doesn't count because it followed certain alleged unfair labor practices on the part of the employer and therefore that representation, while apparent, is not real, but is the result of some form of coercion. [1578]

So that the Board occupies the delightful position in playing around with contracts which apparently were meant to be respected on both sides, by honest men, of being able to say, first, "I don't think you had the representation when you made it," and, second, "If you had it, it doesn't count. It doesn't count because the employer did something apparently without your collusion, perhaps unbeknownst to you, that might have affected somebody and which might have resulted in the situation where perhaps one or two out of three or four hundred members you claim to have might have gotten there in your membership on account of something the employer did."

The rule, of course, in this state, as I have mentioned before, at least up to the time of a very recent case, has been, of course, quite the opposite, and has been that insofar as coercion is concerned if the membership of your union results from activities of the union in ascertaining the pressure which it is able to exert upon employees of the employer

through its economic position in the industry, that is all right.

If membership in your union results in actions of the employer which he has been forced to take as a result of the economic position your union occupies in the industry, that is all right, too.

This employer isn't insulated from the industry of which [1579] he is a part. He has no right to be a perpetual scab employer just because he is a separate unit in an industry. The same thing is true of his employees. They haven't a right, if you can prevent it, to enjoy the conditions you make in the industry and pay their dues to an interloping union or no union at all, or pay no dues at all.

There is as much justice and equity—at least so the courts of this state have always felt in such a view of the situation—as there is in the rather narrow view which we often hear at this Board, which attempts artificially and unrealistically to treat the employees of every business and each individual employer in every industry as something separate and apart from the considerations which affect employees and employers throughout the industry itself.

But regardless of that, the theory upon which I have tried this case is this: That insofar as the Board's case shows our right to represent is concerned I have no objection to that evidence. But if on the basis of lack of representation the Board is seeking to strike down or impair, then the proof of that lack of representation is an affirmative obligation of the Board itself, and if they want our rec-

ords they can call for them and our records are available to them, without issuance of a subpoena. I do not have to say that the records of representation that we [1580] delivered over into the Board's possession are available to the Board, that is, the records of representation obtained prior to the election.

Now, on this other point, it seems to me, that is, the question of whether regardless of anything that can be controlled by the union is the contract affected by some independent unilateral action taken by a party of the contract; on that question a rule of reason certainly ought to be employed.

I can visualize a situation and I have seen the C.I.O. do it many, many times before this Regional Board, where an A.F.L. Union is embattled in a terrific struggle with an employer, in the course of that battle all sorts of unfair labor practices are being committed. The C.I.O. Union has a little talk with the employer. They say, "Well, maybe there is another way out of this picture besides an unending struggle with the A.F.L. Maybe if you had a union contract everything would be all right."

And they attempt, under those circumstances and while the struggle is still going on, to make a contract with the employer.

Now, I can see in a situation like that the effect of the unfair labor practices which might carry on so as to affect the acquiescence of the employees in C.I.O. membership. It might militate against their maintaining A. F. L. membership. [1581] It might affect their acceptance of representation and of the contract itself. That question is one of fact, it seems to me.

You can visualize that situation where the affect of the unfair labor practices upon the union is very real, very immediate, very heavy. You can, of course, visualize lots of other comparable situations that come up in our practice, situations where a union that has lost out, either through inactivity or negligence, which is what I think caused the C.I.O. to be in the position that it is in respect to Pioneer Electric Company in this case—I won't say negligence, but the kind of a mistake we all make in governing the affairs of our business. I think Johnny Despol has made one of those kind of mistakes. I think he made the same kind of a mistake anyone might make. I think he chose to ride one horse instead of two, and it proved to be a mistake.

As I say, on the other hand, as apart from that situation where the unfair labor practice is in a position to very seriously affect a contract proposed with another union, we have the classifications in which the unfair labor practices that are unilateral —that is, unfair labor practices of the employer alone—we have the situation where the unfair labor practice is very negligible insofar as it affects the interests of the first union contended for [1582] representation, and sometimes it is charged only for the purpose of blocking the other union, blocking the other union that perhaps had a previous interest, a continuing interest, but it is a good way to say, "Well, now, if the employer has done anything you are out. We get our one crack at the apple. We get our chance to make a contract with the employer. You just have to wait. Not because you have done

anything, not because we have done anything, apparently."

Therefore, I think we have to consider the effect if we are going to measure up the unfair labor practices against the obligations of the contract upon which the existence of both A.F.L. and C.I.O. Unions almost entirely exist under the present dispensation.

If we are going to measure unfair labor practices against the obligations of contracts, then I think we have to regard them as presenting questions of fact from two aspects. One has the unfair labor practice made it impossible for the contract to be regarded as a fair one and the presentment always ought to be in favor of the contract, it seems to me, when the parties are shown to have no incapacity. And second, presuming that the unfair labor practices occur, are they insulated either in point of time or from other reasons from direct, heavy, immediate, actual and material effect upon the validity of the contract?

Now, that isolation can take place in various ways. [1583] In the first place it can be isolated in point of time. I have a case here I talked over with Mr. Nicoson occasionally. The last time I talked to him about it the situation presented was this:

There had been unfair labor practices occurring in the year 1944. The C.I.O. brought a complaint in about January of 1945. There was a hearing in March of 1945.

The Trial Examiner made his intermediate report in August of 1945, and at the last time I dis-

cussed it with Mr. Nicoson the parties involved in that charge case, the company, the C.I.O., were still waiting for the Board to tell them when they would argue the matter in Washington on oral argument.

Now, shortly after the unfair labor practices occurred the nature of the company's business changed so that the C.I.O., by reason of its jurisdiction of this change in business, lost a great deal of its interest in the jurisdiction, the labor jurisdiction presented by that particular business.

On the other hand, that change in jurisdiction brought within the field of a competing American Federation of Labor Union—the American Federation of Labor Union went in and organized, went in and organized 100 per cent, not at the time of the intermediate report but shortly after or during the time of the hearing. That organization had legitimate causes and reasons besides, and apart from the unfair labor practice [1584] charges.

Those employees are still waiting for a chance to make a contract with the company. Why? Because somebody says that back in 1944 the company committed an unfair labor practice. Those employees are waiting for justified wage increases which have been due them all that time, because nobody can represent them. That is the result of taking and putting a false value on an unfair labor practice and viewing it as something not actionable in and of itself, but something that has an imaginable effect on the part of the succeeding parties, some of them innocent parties, on the ability of innocent parties to contract. That isn't right.

If an unfair labor practice is insulated in one or three or four effective ways from the sort of effect I spoke about on the contract, itself, it ought to be dealt with as an unfair labor practice. The employer ought to be punished, too, if it is guilty. But the union that comes in and tries to give the employees the representation they want and the only representation that can effectively serve them should not be penalized by having its contract struck down or its obligations abrogated, nor should its members be penalized.

Here is a situation in which you have an unfair labor practice that is insulated in about four ways from affecting [1585] this contract. First, it is insulated in point of time. Second, it is insulated because its effect is summed up, vitiated and disposed by an election. Third, it is vitiated because it occurred in another field, that is, among the employees of another company which has been specifically excluded from consideration with respect to the contract, both by the C.I.O. Union and the Board.

Again it is insulated in point of time because it fails to show a continuous effect, it fails to show an effect continuing on this record. It fails to show an effect that could be appreciable in the continuing effect after the date of the election. It fails, in other words, to show any connection with the new organizing campaign of the American Federation of Labor after the election. It fails to show any connection with the dispositions of or the directions of the managing head, Mr. Durant, of the Pioneer Electric Company. It fails to show any degree or

matter of instigation from him on his part or through him.

I urge that taking the last, taking the Board's and C.I.O. contentions on their face, assuming everything they want to believe is true, assuming that coercion occurred, assuming that the company exercised this coercion on its members, assuming that the coercion exercised on the members was in the direction of having them avoid membership in the C.I.O., I say that it is the kind of coercion that the National [1586] Labor Relations Board ought to differentiate from the ordinary type of coercion applied by an employer.

The ordinary type of coercion employed by an employer is put upon his employees for the purpose of taking advantage of them, for seeing to it that they don't have the right to be represented by a labor union or any union of their own choice. That is the average unfair labor practice cases; isn't it?

It is an action taken by an employer who is doing it because it is a part of his policy of discriminating against his employees. It is not in the usual instance the action taken by an employer because he has been forced to it by economic pressure of a type which it is proper for competing labor unions to use.

The record in this case shows, I believe, that if coercion was used by the employer in this case, it was a different kind of coercion, it was a different kind of unfair labor practice which he has been using against the A. F. of L. in all the years since the start of our organization drive and up to the

time of the beginning of the war. It is a different kind of unfair labor practice which has resulted in the almost innumerable charges that we ourselves have filed here against the O'Keefe and Merritt Company.

The record in this case makes it pretty fairly apparent, I think, that as far as the domestic field for the O'Keefe and Merritt product was concerned, the A. F. of L. had the [1587] company pretty well licked when the war came on. There was only one thing that saved it and that was the war time production and going into a period when we could not continue our strike and boycott activities. The record pretty well shows that the employer was forced to the realization—when the exemptions afforded by the war emergency ended, he was forced to the realization that the A. F. of L. fight would be continued, and if that fight were continued the effect of that fight and our boycott would be to put the company out of business.

Now, that is the situation, it seems to me, in which an employer has a right to an opinion, not on the question of shall you or shall you not join a labor organization of your own choosing, but on the question of the company being subject to the legitimate activities of a legitimate labor union, a labor union just as legitimate as the C.I.O. which has never done anything to bring pressure upon the company up to that point of time. Have they got a right to consider whether or not they have to settle with the labor union or not? Have they got a right to decide, "We have got to make a contract

with the A. F. of L. if we want to stay in business"? Have they got a right to make that decision? I think they have. If they haven't got a right to make that decision, what purpose is any strike, what purpose is any boycott, what purpose is any labor activity except to bring an employer to the very decision which apparently had been made by the employer in this case.

Now, all the C.I.O. is hollering about is the fact that the A. F. of L. have made the employer see the handwriting on the wall, and the employer reacted, not against the C.I.O., not in response to anything the C.I.O. did, but the employer reacted as the result of legitimate economic pressure toward the making of an American Federation of Labor contract and toward the actions preparatory to the making of such a contract, a contract which was necessary in view of the dominant position of the A. F. of L. first in the stove industry of this community and second in the building and construction trade industry everywhere.

Mr. Schullman: Mr. Examiner, I am certain it will just take me a few minutes. I came from another hearing in behalf of the—I don't want to mention the other union in the other hearing. I came in behalf of the Painters Union, Local 792. We do not intend to put on any testimony, since the record obviates any necessity of testimony in behalf of my clients. However, we do wish to make two motions that will be very brief, nor will I go into a long argument in support of them.

We move, first, that this action be dismissed in-

sofar as it relates to the Painters' Local 792, and that Painters' Local 792 be dismissed as a party from these proceedings. That is one motion. This motion is predicated factually and [1589] briefly on these positions:

The testimony by the preponderance establishes unequivocally that the Painters Local 792, assuming for the sake of this discussion that the Board and the Examiner will conclude that the identity of the corporation and the partnership was one and the same, that there was no participation in the consent for the election, that there was no authority given to anyone whomsoever to speak for Painters Local 792 during the period of consent before the election, that the Board's exhibits three et sequitur, which related to the election, clearly establish that the C.I.O. either erroneously or otherwise mentioned no other union being interested, or if they knew of the other unions, and particularly the Painters Local, they tacitly recognized that the Painters were exempt from the unit, and if they did not know about them, they excluded them, since they did not give any notiec or the Board acting for them gave no notice to any Painters' representative, as the result of which we clearly have, insofar as my client is concerned, speaking singly for them, an improper unit upon which my client cannot be concluded, because neither the Board nor any labor organization speaking without authority for my client can by consent exclude them, preclude them, or conclude them from participation in a unit to which they properly belong, to which clearly in the case they properly belong. [1590]

So much so for the fact that if there is a determination by the Board and the Examiner that the corporate and partnership are the same interests. Of course, if the Board and the Examiner find that there is a separate identity between the corporation and the partnership, then ipso facto, of course, my clients should be excluded. There is no scintilla, iota, or any particle of evidence in this record which in any manner ties in the Painters, and we believe that unquestionably the Examiner will find and the Board, we believe, will find thereupon that the Painters should be carved out, excluded, and the action dismissed as against them.

One more point, without embellishing upon what was stated by counsel who just preceded me, the burden of proof is unmistakably placed upon the Board, the records of which are either in their possession or can be secured, and we will be happy to, without subpoena, produce them, that at the time of the entrance into the contract with the Pioneer Electric Company, Painters' Local 792 did represent not only a majority but all of the painters involved and employed at the premises at the time.

For these reasons, insofar as the first motion is concerned, we believe that it is imperative and obligatory upon the Examiner and the Board to dismiss these proceedings as against my client.

Before going into the second motion, since the matter involved primarily concerned the company but since it may affect some of the consideration, I believe from whatever part of the testimony I have heard there is a parallel and continuing differentia-

tion of identity between Pioneer Electric as a co-partnership and O'Keefe and Merritt, which distinguishes the facts in this case, without attempting at this time to enumerate them, and the facts in cases such as the Simmons case which came down within the last several months, and the War Labor Board case which came down shortly thereafter, and all of the other cases that continue the certification on the succeeding new corporation. One of the distinguishing factors, of which there is an abundance, is the fact that Pioneer was in existence long before the contemplation of the parties herein, certainly before the contemplation of the C.I.O.; that it did not take over all of the operations or the substantial operations of O'Keefe and Merritt; that there was less than a 50 per cent controlling interest by those who are interested in O'Keefe and Merritt and those who are interested in the Pioneer Electric Company; that as a matter of fact O'Keefe and [1592] Merritt had other companies who did make and did perform substantially for them during the war period. I am going to let the record speak on that for itself, because I think that is the burden of the company and the Board, but I do think from a purely legalistic standpoint, I do not think we can attach stare decisis of the Board in previous decisions as affecting this case.

My second motion that this action should be dismissed insofar as my clients are concerned and as a party to the action, because the only thing sought insofar as they are concerned by way of relief is the attempt to strike down a valid and subsisting con-

tract. I believe and therefore I think that my second motion should be granted, that this Examiner and primarily the Board is without jurisdiction to impair the obligation of a contract where under these facts indicated in this case there is such a contract between a company and a bona fide labor organization concerning which there is no dispute. My client being part of the American Federation of Labor, I think it has been stipulated is a bona fide labor organization. The testimony is clear that at the time—there has been no contrary burden met by the Board—it represented all or at least a majority of the painters involved. Representations were made to my client that this was the Pioneer Electric Company. At that time he had no knowledge of any other [1593] action or certification or anything else, speaking of he meaning the union; that thereafter the union could and did enter into a contract.

I am familiar with the case of Consolidated Edison Company, which spoke in dicta fashion about the right of the National Labor Relations Board under certain circumstances to strike down a contract, but I say this, and I suggest it be read very carefully, as I am sure everybody has, insofar as the legal statement is concerned the Consolidated Edison case is authority for the fact that the National Labor Relations Board does not have the right to strike down a contract, and then in dicta it goes on to say perhaps under certain circumstances it might. That is not decision. That is dicta. More properly, I think when we scrupulously read the

Act, as I interpret it Congress did not intend to give power to the National Labor Relations Board to invalidate a subsisting valid contract properly executed between the parties, when one of the parties was a bona fide labor organization, and if any such authority exists in Congress or in the Act, those who are given the right to administer the Act in their attempt to do so would be going beyond the fiat powers, and any act they would undertake would be invalid and would be illegal and have no force and effect. We will deal with that in our brief at some length. [1594]

Trial Examiner Kent: Yes. Apropos of that, I may call your attention to the International Association of Machinists' case.

Mr. Schullman: I am familiar with that. I say that in all those cases I will draw the preliminary line of distinction that this issue we are now presenting has not been determined as a matter of law and is clearly, as is argued by Mr. Garrett and effectively, under the facts in this case as in the Consolidated case is dependent upon those facts. There is no question that this is a bona fide labor organization, there is no question that a valid contract was executed when we represented all the people involved, and representations were made that this is some other group entirely. I say that I think that the only way the Board can reach the American Federation of Labor unions in this case is through the relief sought of striking down the contract. There is no other relief with which we are concerned. We are named as a party, incidentally not

under the Act itself, something I don't know if it has been raised before, and I don't intend to raise it at great length now, but the Act itself in a complaint action does not designate a union as a party. It is the rules which suggested it, and those rules cannot go beyond the limitations or the purview of the act itself. If they attempt to go beyond them, there is a want of authority to do that, [1595] then the rules themselves are of no force and effect. So I say the naming of parties is merely a gratuitious suggestion of the Board.

Trial Examiner Kent: I wonder if the Consolidated Edison case did not indicate that a contract could be stricken.

Mr. Schullman: It did.

Trial Examiner Kent: But held in that case because the labor unions were not made parties that they would not strike it.

Mr. Schullman: That Consolidated Edison case, as I read that case and study it in detail, it just stated that it could not be stricken as a matter of law, on the facts proven by the National Labor Relations Board. Then it went on in dicta, not in decision, and said perhaps—I am paraphrasing—perhaps if certain other factors were true we might do it. I say therefore that the better law and the law which probably should be followed, because there is no authority in the Act also, that you cannot strike a valid contract. The National Labor Relations Act never had that power.

Trial Examiner Kent: No, I grant that. I don't think that a valid contract can be stricken. The

main issue I think is whether or not this is a valid contract.

Mr. Schullman: And before you can find the contract is [1596] invalid, you must find that this is not a bona fide labor organization, but if it is a bona fide labor organization I think you are precluded from going farther, at least we will cogently argue that in our brief.

I say that there are two alternatives, first, that there is no evidence whatsoever against my client on the first portion, and also, if the Board finds that the identity of the parties was the same, these respondents are, if they find they are separate entities, then of course we are out of the picture. Then on the facts we are not involved and should be dismissed; that as a matter of statutory law the relief sought against my client and presumably against the other unions could not be granted under the facts.

Trial Examiner Kent: I don't think the question of company domination, the complainant does not allege that any of the A. F. of L. unions are company dominated. I think Mr. Nicoson will agree on that, won't you, that you are not claiming that?

Mr. Nicoson: There is no allegation that the A. F. of L. union was company dominated.

Trial Examiner Kent: So you do not have to meet that.

Mr. Schullman: Then I think we reach this constitutional question. This Board then, if the union is not company dominated, I don't think then this Board has any right as [1597] a matter of law to

strike down the contract. I will be glad to go into detail on that in the brief.

Trial Examiner Kent: The issue to be determined is whether or not the company rendered any assistance.

Mr. Schullman: Assume they did——

Trial Examiner Kent: That is your I.A.M. case.

Mr. Schullman: Assuming they did, if they render assistance under the identity of a different and separate corporation as against a co-partnership, under which we have continued for a great many years and still continue to have a contract with the A. F. of L. unions, when they represented a majority, you would be acting unconstitutionally in an attempt to strike down the contract.

Trial Examiner Kent: I would like counsel to consider the International Association of Machinists against the N.L.R.B. case.

Mr. Schullman: I will include that.

Trial Examiner Kent: That Supreme Court decision. In stating that, my mind is not made up, because I have got to balance the principles of those decisions with the factual situation in the actual case.

Mr. Schullman: But Mr. Trial Examiner, that is just from a legal standpoint now. On the factual standpoint, assuming that that case would be the law, I am talking about the language of the Supreme Court in the Consolidated Edison [1598] case, then under the facts in this case this court must find that the contract is a valid and subsisting contract.

Trial Examiner Kent: Oh, yes, the factual issue has to be decided, and there are a number of collateral issues that have indirectly got to be disposed of. It is not by any means, I don't think, a case which can be resolved into a simple single issue. That is the reason that I think it is a very interesting case. I think there are some interesting issues raised.

Mr. Schullman: Except irrespective of what conclusion the Trial Examiner or the Board may reach, insofar as the painters' local is concerned, only one conclusion can be reached ultimately, because there was no testimony concerning them at all.

Trial Examiner Kent: Well, that again is a question of the record. It is quite a long record and I can't——

Mr. Schullman: We do not ask an immediate decision.

Trial Examiner Kent: I am not making one, and I am not finding as fact what is in that record at this time.

Mr. Nicoson: Do I understand that both A. F. of L. groups have rested? I have two rebuttal witnesses I want to call. Do I understand that you gentlemen have rested your cases?

Mr. Garrett: I have found a negative pregnant in my answers that I want to correct. With that I will rest. [1599]

Mr. Schullman: I have rested my case, since I think it would be a superfluity to put in any evidence.

Trial Examiner Kent: Now, I suggest that you gentlemen may have the privilege of the same twenty days that are granted Mr. Collins.

Mr. Schullman: May I have permission to withdraw? I came here from another hearing, and I want to get back. Thanks very much.

Trial Examiner Kent: Surely.

Mr. Garrett: I notice first on these answers, and I have got three of them in. There is a requirement for a power of attorney on the one filed by respondents. I suppose that my filing of answers has been more or less a gratuitious act anyway, and I assume that requirement in the rules could be waived. All of my answers are verified by persons who are known to represent the labor organizations involved. I think only one of them actually is accompanied by a power of attorney. Is there any point to be made on that? Is it possible to have the stipulation that the requirement for the power of attorney be waived? Our placing of an answer in here, under the Consolidated Edison case I appreciate might be a matter of some significance as conferring jurisdiction. I will need time to file those other two powers of attorney if the requirement is not waived.

Mr. Nicoson: I make no point of it for the Board. [1600] So far as I am concerned I will stipulate that it may be waived. I have some doubt as to my power to stipulate or waive the rules of the Board, but I think——

Trial Examiner Kent: Well, I suppose you could

safely stipulate, but the power may be something else.

Mr. Nicoson: I have nothing to raise on that, no objection to that for that reason.

Mr. Garrett: I will let them go by that, on the simple verification. I found a negative pregnant that occurs in all of the answers, and I would like to correct it.

Trial Examiner Kent: Well, I wonder, if it is in effect, if it has not been waived by failure to object earlier anyway.

Mr. Garrett: You mean that that requirement perhaps is waived? No, there isn't any requirement. I suppose that participation by contract parties in this type of proceeding is so new that no board rule has been devised as to that. The requirement for powers of attorney seems to run only to respondents.

Trial Examiner Kent: In any event, of course it is not mandatory for the party to file an answer. That is a privilege under the rules that the party has. There is no question but what you fully participated in the proceedings, and so I think it is probably rather highly technical, and I can't see how you are prejudiced. [1601]

Mr. Garrett: Now, this negative pregnant occurred in my attempt to deny, and these answers were prepared rather hurriedly, the allegation in the complaint in Section 5-D, that at the time of entering into the A. F. of L. contract, none of the A. F. of L. organizations was the duly designated bargaining representative of the employees at that

time. I propose by way of amendment to the answers of all of them that the following matter be added at the end of paragraph three of the moulders' answer, the carpenters' answer, and the stove mounters' answer: "And this answering labor organization alleges it was said duly designated bargaining representative of said employees at the time of entering into said contract."

I ask leave to make that amendment by interlineation.

Mr. Nicoson: No objection.

Trial Examiner Kent: The amendment will be granted as requested.

Mr. Garrett: That is our case.

Mr. Nicoson: I will call Mr. John Despol.

Trial Examiner Kent: We will take a recess of five minutes.

(Short recess.)

Trial Examiner Kent: Do you want to answer the motions?

Mr. Nicoson: Just so the record is complete, note my opposition to the motion, and I do not agree with what was [1602] said, I do not agree that that is a fair summation of the evidence, and I stand on the record.

Trial Examiner Kent: I will reserve ruling on the motions and I shall directly or in effect upon all motions in my intermediate report.

JOHN DESPOL

recalled as a witness by and on behalf of the National Labor Relations Board, being previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Nicoson:

Q. You are the same Mr. Despol who has previously testified in this hearing, are you not?

A. I am.

Q. Directing your attention, Mr. Despol, to the latter part of December, at which time you testified you had a meeting with Mr. Cecil Collins of O'Keefe and Merritt Company, at which present besides yourself and Mr. Collins were Johnny Lovasco, Joseph Sanchez, Frank Doyle and another person; I will ask you whether or not during the discussions of the contract that ensued at that meeting Mr. Collins said to you this or this in substance: This may be all in vain, no contract may be necessary, there may not be an O'Keefe and Merritt Company, and that they were contemplating switching over and organizing a new firm under the name of the Pioneer Electric Company. Was that said or not?

A. He did not, not at that time.

Q. Did he say that at any other time?

A. At the meeting that I had with him in the bar.

Q. Did he say that at any other meetings that you held with him in Collins' office? A. No.

Q. Did you have any other meetings with respect

(Testimony of John Despol.)

to the contract with Mr. Collins except in the office and those two occasions at the bar?

A. Not where we discussed the contract.

Q. At the same meeting did Mr. Collins say this to you or this in substance: That those negotiations, referring to the switching over to the Pioneer, were then under way. Did he say that or anything like that? A. No.

Q. Did he say that at any of those meetings, and excluding those two at the bar that you had with him? A. No.

Q. At this same meeting and at the same time and place, did you say anything to Mr. Collins with respect to the C.I.O. having done considerable organizing work at a considerable expense? Did you say that or that in substance at that meeting?

A. No.

Mr. Garrett: What meeting was that? [1604]

Mr. Nicoson: It is the last half of December.

Q. (By Mr. Nicoson): Did you say that to Mr. Collins or that in substance at any meeting you had with Mr. Collins excluding those two at the bar?

A. No.

Q. Did Mr. Collins at this time and place say to you this or this in substance, that he would be willing to take it up with his plant to see whether or not some sort of adjustment about the organizational expense could be made? Did he say that or that in substance? A. Definitely not.

Q. Did he say that at any of your meetings excluding the two at the bar?

(Testimony of John Despol.)

A. At no time, including those at the bar.

Q. Including those at the bar. At this same time and place did you say this to Mr. Collins or this in substance, that you guessed you had made a mistake and that you should have included the Pioneer in the election. Did you say that or that in substance at that meeting?

A. No. I was not aware of the Pioneer Electric at that meeting.

Q. Or at any other time? A. No. [1605]

Q. Did you say at that meeting, at the same time and place, that you guessed you would have to go to the National Labor Board to get them to help you out of this fix? Did you say that, or that in substance at that time? A. No.

Q. Did you say that at any of the meetings outside of the two at the bar? A. No.

Q. Excluding the two at the bar. Did you say that at the bar?

A. We stated at the bar that we would file an unfair labor practice case.

Q. At the meeting at approximately the middle of January at which was present yourself, Mr. Despol, Bud Daley, Cunningham and two other persons, did Mr. Collins say to you at that time and place he saw no reason for continuing the meetings since there would be very few O'Keefe and Merritt employees to make it worth your trouble? Did he say that, or that in substance?

A. No, definitely not.

(Testimony of John Despol.)

Q. Did he say that at any time excluding the two bar meetings, to you?

A. Well, after the two bar meetings, he called me on the phone and he, in effect, as I previously testified said there [1606] were no O'Keefe and Merritt employees.

Q. But excluding the two meetings at the bar and confining your answer only to meetings that you had with Mr. Collins, as you said—— A. No.

Q. At this same meeting, at the same time and place in the presence of those same persons, did Mr. Collins say to you this, or this in substance, that another company contemplated transferring all production to another firm? Did Mr. Collins say that, or that in substance to you? A. No.

Q. Did Mr. Collins at the same time and place and in the presence of the same persons say to you this, or this in substance, that you mentioned that if another vote was to be authorized by the N.L.R.B. it would very likely sway the issue? Did he say that, or that in substance?

A. Will you read me that question, please?

(The question was read.)

Mr. Nicoson: At this time.

The Witness: I don't know what is meant by "sway the issue."

Q. By Mr. Nicoson): Do you remember him making that statement or any statement like that?

A. The only statement I recall him making is that in his understanding most of the employees

(Testimony of John Despol.)

were supporting the [1607] A. F. of L. and not supporting the C.I.O.

Q. When did he say that?

A. At one of our meetings in January, I don't recall which.

Q. Do you recall whether that was in the presence of Daley and Cunningham and the two other A. F. of L. people or not?

A. I don't recall what particular meeting it was said at.

Q. Not, at this same January meeting, do you recall having said to Mr. Collins this, or this in substance, that you were the authorized representative of the C.I.O., that you had gone to expense and trouble about the organizational work, and that you would continue. Did you say that, or that in substance?

A. This was at the bar you are referring to?

Q. No, this is the middle of January. Did you say that to him, or that in substance?

A. No, I don't recall any conversation of that nature.

Q. I am not at this time asking you anything about the bar meetings, unless I tell you so. At that same meeting, did Mr. Collins say this to you, or this in substance, that he did not see how Despol had any right to continue since the majority of the employees favored the A. F. of L.? Did he say that or that in substance at this January meeting?

A. He did not say that, as I just previously said, he said that, in his opinion—— [1608]

(Testimony of John Despol.)

Q. Did Mr. Collins at this time and place say to you this, or this in substance, "Why mention the expense of organization? I mentioned before I am willing to discuss the matter with my client and see if we can reimburse you for what expenses you have had involved." Did he say that, or that in substance at the January meeting? A. No.

Q. Did he say that at any other meeting, excluding those at the bar? A. No.

Q. At any meetings that you had with Mr. Collins, except the two at the bar, did Mr. Collins state to you this, or this in substance, that the Pioneer was taking over and fabricating parts for O'Keefe and Merritt? A. No.

Q. The witness John Lovasco at page 1487 and 1488 of the record testified as follows:

> "Q. Did Mr. Despol ever tell you he didn't want you to attend any meetings?
>
> "A. Yes.
>
> "Q. What did he say to you?
>
> "A. This was after I had already attended that meeting there, and it was, I believe, when they had put on their first demonstration, or so-called picket line, out there, that he, after the 8:00 [1609] o'clock whistle blew, why, naturally, I was coming in, straggling in a little late that morning, and he greeted me on a side street and he says, 'John,' he says, 'I don't want you to attend any more meetings, that Collins and I want to discuss this contract over.'

(Testimony of John Despol.)

"I says, 'As long as there is going to be a contract discussed' I says, 'I will be there or other A. F. of L. members will be there to see that nothing is pulled.' So he then grinned at me and he said, 'Johnny, I like you very much.'" [1610]

"I says, 'I like you, too.'

"And he says, he told me, he says, 'I don't want anything to happen to you.'

"I says, 'I don't think anything is going to happen to me.'

"Q. Happen to what?

"A. Happen to me. He says, 'Well, we got means and ways of taking care of fellows like you.'

"Then, I says, 'If you have, you take care of yours and,' I says, 'but I will take care of mine,' and I walked away."

Did any such meeting or conversation occur as that?

A. I once told Mr. Lovasco at the plant gates, following the two sessions on the contract with Mr. Collins, that we would not permit any further presence in our negotiations of any employee purporting to represent the A.F.L.

Q. Did you say to him at that time or at any other time this, or this in substance:

"'Well, we got means and ways of taking care of fellows like you.'"?

A. No.

Mr. Nicoson: That is all.

(Testimony of John Despol.)

Cross-Examination

By Mr. Garrett:

Q. When you told Mr. Lovasco you couldn't have him at any more meetings, did he agree that he would [1611] stay away or did he indicate some disagreement with your position?

A. I don't recall whether he indicated agreement or simply said nothing about it; one or the other. He didn't indicate that he would pursue efforts to attend any further sessions, I am sure of that.

Q. So you didn't have to tell him anything about what would happen to him if he did?

A. That is correct.

Q. It took me quite a long time to find this, Mr. Despol. You will have to pardon me.

But in connection with your last answer about what you told or didn't tell Mr. Lovasco about coming to meetings, I would like to read you from page 740 of the transcript. It is about the twelfth line.

Mr. Garrett: Have you the page, Mr. Nicoson?

Mr. Nicoson: Yes. Go ahead.

Mr. Garrett: I will start with the fourth line.

Q. (By Mr. Garrett): You were asked this question, Mr. Despol:

> "Q. Didn't you tell one of the committee men, Mr. Johnnie Lovasco, not to come to the meeting, you didn't want anybody at those meetings?
>
> "A. I don't recall when it was I told Lovasco. One time I told him I hoped he would not

(Testimony of John Despol.)

attend any more [1612] meetings because no meetings would be conducted with his presence from there in.

"Q. Did you tell him you hoped he wouldn't come there or he better not come there?

"A. He better not come there, there wouldn't be any meeting.

"Q. You didn't tell him what it meant, you merely told him he better not come there?

"A. I told him he better not come there, there wouldn't be a meeting."

Did you so testify? A. That is correct.

Q. Just one question. I was trying to find whether I asked it before or not. I can't find it in my previous cross-examination.

Will you state, Mr. Despol, when you first heard mention of the Pioneer Electric Company?

A. I was under the impression I had heard mention of it from Mr. Anaya, I think, to which I testified. During the recess I questioned Mr. Anaya and Mr. Conway, both, about it, and they told me I was incorrect, it was a trucking company they had reference to, the name of which I don't know and I don't think they know.

Q. That was in connection, as you recall it, with the discussion of the April, 1944 Board hearing?

A. That is correct. The second time and the only time I clearly recall the name Pioneer Electric being mentioned was my meeting with Mr. Collins at the bar on the 25th of January.

Q. Now, of course you don't know what your

(Testimony of John Despol.)

local union officers knew, Mr. Despol, but you do recall the time of the first organizing drive, do you not, at the O'Keefe and Merritt plant?

A. Yes.

Q. What was the year of that?

A. The first?

Q. Yes, the first one.

A. The first one—that was put on by the International Union, not the local union. That was in 1940, as I recall.

Q. Before the war or after?

A. Before the war. It was not an intensified drive, the first——

Q. Mr. Charles Spallino has testified here, the record shows, about being in a meeting at the company office at which he claimed he was reprimanded for, or his attention was called to the fact that he had been to a meeting for O'Keefe and Merritt employees in the United Steelworkers Hall on Slauson. He was indefinite about the time of that, but he put it at the earliest at 1942.

Do you place any organizing activity at or somewhere [1614] after that date?

A. I believe there was some effort in 1942, pretty much the same nature as 1940. So far as I know the first intensive drive we made was in 1944, in the sense there was full scale effort.

Q. Well, I will call your attention to the fact that the evidence here shows that Pioneer Electric had considerable employees in 1942, and thereafter they were separated from the O'Keefe and Merritt

(Testimony of John Despol.)

employees by a physical partition in the building. You heard that testimony; didn't you?

A. Yes.

Q. Yes? A. Yes.

Q. When, in connection with that——

A. We were not aware of Pioneer Electric. Mr. Anaya, who was running the 1944 campaign, was not aware of Pioneer Electric in my conversation with him until after the National Labor Relations Board hearing was held. It was his impression then, and Mr. Conway's impression, who was connected with it, a trucking company was involved.

Q. You must mean the Service Incorporated?

A. Yes, Service Incorporated trucking service.

Q. That wouldn't be enough employees, Mr. Despol, to affect the vote when you came back and stated that you wanted to correct your testimony. The evidence given since [1615] seems to show they only had 8 or 10 employees.

A. That is correct. Mr. Anaya says my impression of what he said to me was wrong. The basic factor that caused us to be unable to secure an election in '44 was there had been a large layoff of employees at that time, and that the majority of those laid off were those that had been signed up with our organization. That factor, their names were not on the payroll submitted to the Board, was responsible for us not securing an election at that time.

Q. Can you agree with me now it couldn't have have been the reason for your failure then that the

(Testimony of John Despol.)

Service Incorporated Trucking employees were not on the payroll?

A. I will agree with you in that.

Q. Now, without trying to argue with you, Mr. Despol, about what your subordinates knew or should have known, the evidence—and I think it is evidence since you testified, too—has come to seem to indicate around here from 1942 on that all through 1944 a large part of the employees at that location—perhaps the majority—were employees of Pioneer Electric of that generator work. Is that a fair statement of the evidence?

Mr. Nicoson: I object to it as not being a fair statement of the evidence.

Mr. Garrett: What is the correct evidence on that?

Mr. Nicoson: During the war time—this is not in the [1616] evidence—O'Keefe and Merritt had approximately 400 to 450 employees. The most Pioneer is shown to have had is 180.

Mr. Garrett: All right.

Mr. Nicoson: I further object to this line of questioning on the ground it is not proper cross-examination of rebuttal testimony and it has been asked and answered. He went over it when Mr. Despol was on the stand before. Now, I don't want to stay here all night.

Trial Examiner Kent: I think the objection is well taken. I will sustain the objection.

Q. (By Mr. Garrett): When you learned after the April, 1944 election of the presence of Pioneer

(Testimony of John Despol.)

Electric interest in the location down there, when was that?

A. We didn't learn of Pioneer Electric's presence in the form it is now appearing to have been. What we were aware of was the lay-off and of the service company set-up.

Q. There is evidence here, stated by Mr. Nicoson, that through that time there was a large—not a majority, but Mr. Nicoson mentioned 180 Pioneer employees. How could you possibly have missed that large group?

A. I can't explain that because I wasn't here at the time of the '44 campaign. I would like to know myself.

Q. You never learned about the Pioneer group even after that 1944 N.L.R.B. case, until Collins first told you about it at the bar; is that right?

A. The first time I heard the name of that company.

Q. Had you ever been around the plant prior to that organizing drive in 1944?

A. No. I wasn't in the '44 campaign, except in the winter for a few weeks, because the balance of that year I was in Washington, D. C.

Q. You knew, Mr. Despol, at that time all these war plants, all employees were required to wear an identification badge with the name of their employer prominently displayed on it, and the number and so on. How do you account for the fact throughout that entire period from 1942 up to 1945 none of your representatives or local union officials were

(Testimony of John Despol.)

unable to detect such a large group of men wearing identifying badges that said "Pioneer Electric Company" on them?

Mr. Nicoson: I object to the question on two grounds. First, it is improper cross-examination of a rebuttal witness. Second, it had been asked and answered. He laboriously examined this witness when he had him on cross. I don't think, your Honor, we have to sit here all night and let him recross examine this witness on all matters. He has a right to cross-examine him on the matter brought out on rebuttal. He certainly doesn't have to go back over the whole case and reexamine him and cross-examine him on everything.

Trial Examiner Kent: Now, that is true, as far as rebuttal goes. I will let the answer be taken. I think until [1618] the hearing is closed that counsel may treat it as practically calling a witness on direct and asking any questions material to the issues.

Q. (By Mr. Garrett): I am frankly asking you a question relating to the knowledge of your subordinates. I would like to hear what you have to say on that subject.

A. The campaign was conducted by representatives of the International Union over the period you speak of. As I have indicated, the 1940-1942—the effort was only sporadic. In '44 I was not here. The only few times I was out in the plant the winter of '43-'44 I don't recall seeing any Pioneer Electric badges, so to speak.

(Testimony of John Despol.)

Q. Did the employees you saw have identification badges?

A. The other—yes, I think they all had badges on. The other representatives of the union at no time either long distance conversation or since my return have indicated any knowledge about the operation of the Pioneer Electric per se.

Q. What did you mean by "per se"?

A. As such. Isn't that what it means?

Mr. Nicoson: That is pretty close.

Q. (By Mr. Garrett): I can't follow your Latin.

A. You lawyers argue out the language.

Mr. Nicoson: That is pretty close.

Q. (By Mr. Garrett): That "per se" makes me ask one more question. Did they indicate anything—— [1619]

A. I withdraw the per se.

Q. Did they indicate anything other than per se?

A. I don't understand the question. I withdrew the per se.

Q. Your answer would be the same without the per se? A. That is correct.

Mr. Garrett: All right. That is all.

Trial Examiner Kent: You may be excused.

Mr. Nicoson: Mr. Conway.

G. J. CONWAY

a witness called by and on behalf of the National Labor Relations Board, having been previously duly

(Testimony of G. J. Conway.)
sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Nicoson:

Q. You are the same Mr. Conway that previously testified in this hearing; are you not? A. I am.

Q. And it was your testimony that you attended some of the meetings Mr. Despol had with Mr. Collins? A. I did.

Q. Did you attend any at which the so-called A.F.L. committee was present? A. I did.

Q. Which one or ones did you attend?

A. I attended one.

Q. When did that occur? [1620]

A. As I remember, the last of December or the first part of January.

Q. At that meeting at that time and place did Mr. Cecil Collins say to Mr. Despol, or to you this or this in substance:

> "This may be all in vain. No contract may be necessary. There would not be an O'Keefe and Merritt Company. They were contemplating switching over or organizing a new firm under the name of Pioneer Electric Company?"

A. They did not.

Q. Did Mr. Collins at that time and place say, "The negotiations were then already under way"?

A. He did not.

Q. Did Mr. Despol at that time and place say,

(Testimony of G. J. Conway.)

"The C.I.O. has done considerable organization work and has had considerable expense"?

A. He did not.

Q. Did Mr. Collins at that time and place say this or this in substance, "His client would be willing to make some sort of adjustment in the matter of organizational expenses"? A. He did not.

Q. Did Mr. Collins or Mr. Despol say anything of those things at any of the meetings you attended, except the two at the bar, or one at the bar? [1621]

A. He did not.

Q. You only attended one at the bar?

A. That is right.

Q. Did you hear Mr. Despol say this, or this in substance, "He guessed he had made a mistake, he should have included Pioneer in the election"? Did you ever hear that? A. He did not.

Q. Did you hear him say this or this in substance, "He would have to get the N.L.R.B. to help him out of this fix"? Did you hear that?

A. He did not.

Q. At any of the meetings that you attended, was any mention made of the C.I.O.'s expense?

A. The word "expense," to the best of my recollection, was never mentioned while I was there. The word "expense" was never used.

Q. With the exception of the meeting that you attended at the bar, at the time you met with Mr. Collins in meetings, did he say to you that he would take it up with his client, to see whether or not he

could work out some adjustment for paying the C.I.O.'s expense? A. He did not.

Mr. Nicoson: That is all.

Mr. Garrett: That is all.

Trial Examiner Kent: You may be excused.

(Witness excused.) [1622]

Mr. Nicoson: At this time, if your Honor please, I move to conform the pleadings with the proof, which is the usual motion and runs, of course, only to minor matters such as spelling of names, and dates, and so forth, and does not go to the material allegations of the complaint.

Trial Examiner Kent. The amendment is granted accordingly.

Mr. Garrett: That is a shotgun motion, if I ever heard one.

Mr. Nicoson: We always make it. May I make another motion? At this time I move to strike the testimony of witness William J. O'Keefe, appearing at page 1449 of the record, which is as follows:

> "The Witness: You told me you were bargaining with Despol for O'Keefe and Merritt Company, and in return for handling the thing in a quiet and orderly manner—in fact, if I remember correctly, you wanted to refer it to the Labor Relations Board. And in consideration for no strikes or violence of any kind you had discussed with Despol paying his organizational expense and so forth he had incurred so far in the organization of our company.

"Q. (By Mr. Collins): I was going to pay it or I would see my client——

"A. You asked if the company was willing to pay that [1623] expense."

I move to strike that testimony under the ruling that your Honor made on page 1442 in which you reserved your ruling subject to motion to strike if Mr. Collins did not testify about this matter. Mr. Collins has not testified, and I move to strike it.

Trial Examiner Kent: I will reserve ruling at this time on the motion, pending the consideration of the record.

Mr. Garrett: I renew all motions to strike, which I have made, at this time.

Mr. Nicoson: Let me finish, now. I understand there is some question about Respondent's 1 and 2, whether or not they are in evidence.

Trial Examiner Kent: Yes. I might state for the record that when Mr. Collins made his original oral motion for continuance he handed the reporter a letter and affidavit in support of his motion. I didn't know anything about it at the time. Within the next day or two the reporter called my attention to the fact those exhibits had been handed in.

I brought the matter up with Mr. Collins and suggested that he, during the presentation of his own case, formally offer them so they might be exhibits. At the time I had reserved Exhibits numbers 1 and 2 and had in mind his first exhibit he offered as No. 3.

In view of the fact Mr. Collins has been excused, I will offer them. [1624]

Mr. Nicoson: I have no objection.

Trial Examiner Kent: I will offer them as Respondent's Exhibit 1—Trial Examiner's Exhibit 1 and Respondent's Exhibit 2—Trial Examiner's Exhibit 2.

I believe on one of them there was not a copy, the affidavit. I will waive the requirement on that exhibit, that a duplicate be submitted.

(Thereupon, Respondent's Exhibit No. 1—Trial Examiner's Exhibit No. 1 and Respondent's Exhibit No. 2—Trial Examiner's Exhibit No. 2, were marked for identification and received in evidence.)

RESPONDENT—TRIAL EXAMINER'S EXHIBIT No. 1

[Letterhead O'Keefe & Merritt Co.]

(Copy)

March 1, 1946

Mr. Stewart Meacham, Regional Director
National Labor Relations Board
111 West Seventh Street
Los Angeles, California

Dear Sir:

I have just been handed a Subpena Duces Tecum (received here on February 27, 1946—which gave our attorney approximately one week, along with his many other appointments already made—to prepare our case) ordering me to appear before you on March 6th, at the hour of 10:00 a.m., at Room 704, 111 West Seventh Street, Los Angeles, California.

I immediately called our Attorney, Mr. C. W. Collins, for advice concerning this matter. He informed me that he had talked with you on the telephone a few days ago, requesting the continuance for the benefit of the Pioneer Electric Company, which he also represents, and that he advised you that one of the partners, Mr. W. G. Durant, was, at that time, in Washington, D. C., another in Honolulu, Hawaii, but that you refused even a one week's continuance so that he might contact his clients, even though you set the case originally to suit the convenience of the C.I.O., and then gave them a continuance of over a week to amend their charge.

He also advised me that in his conversation with you—wherein he requested a short continuance—you stated: ". . . that you will be before the Supreme Court within three months, because the facts in this case show such a flagrant violation that you would not permit any delay. . . ."

Now, it would seem that the facts in the case constitute a report from a disgruntled C.I.O. Organizer, inasmuch as no one from your office was interested enough to ask for our side of the story. As I understand it, the usual practice is to call the interested parties together for an informal interview. It would therefore appear, as mentioned above, that the C.I.O. Organizer's report becomes the facts and you have already decided the case without giving us the usual courtesy of an opportunity to be heard informally, prior to filing the complaint. This would seem to justify the many

reports I have heard—that the N.L.R.B. in this district is very biased in favor of the C.I.O. and, for this reason, neither an employer nor the A.F.of L. can expect fair treatment.

Therefore, inasmuch as you know that you have the facts in the case and have decided against us, I would like to ask if there is any way we could save our time, as well as that of our employees, as it seems useless to appear and attempt to defend ourselves in a case that you have already decided against us. Any suggestion along this line will be much appreciated. I hope you will give me the courtesy of a reply.

Very truly yours,
O'KEEFE & MERRITT CO.

D. P. O'Keefe
Py

[Endorsed]: Filed March 28, 1946.

RESPONDENT—TRIAL EXAMINER'S EXHIBIT No. 2

County of Los Angeles,
State of California—ss.

L. J. Mitchell, being one of the partners of the Pioneer Electric Company, being first duly sworn, deposes and says:

That Marion Jenks, a partner of Pioneer Electric Company, is absent, being in Honolulu, Hawaii, and that W. G. Durant, a partner of Pioneer Electric Company, is also absent, being in Washington, D. C.;

That affiant does not have the authority to bind these absent partners;

That affiant authorizes Cecil W. Collins to represent them and to protect the rights of the copartners and to seek a reasonable continuance of Case No. 21-C-2689 to permit the absent partners to appear and defend themselves and the copartnership.

Dated at Los Angeles this 25th day of February, 1946.

/s/ L. J. MITCHELL

Subscribed and sworn to before me this 25th day of February, 1946.

[Seal] /s/ JEAN H. SHEPARD,
Notary Public.

My commission expires 3-11-49.

[Endorsed]: Filed March 28, 1946.

Mr. Garrett: Will the exhibits be available here until Monday?

Trial Examiner Kent: Well, Mr. Nicoson, I believe, made a statement on the record the other day that he had copies in his own file of all exhibits. Did you not, Mr. Nicoson?

Mr. Nicoson: Yes.

Trial Examiner Kent: Therefore, you will not be inconvenienced. You may see Mr. Nicoson when you want to check on the exhibits.

Mr. Nicoson: Let me make sure that is clear. I have copies of everything except those rejected exhibits of the company's which were rejected.

Mr. Garrett: I wouldn't want to look at them.

Trial Examiner Kent: If there is nothing further, the hearing may stand closed.

(Whereupon, at 5:00 o'clock p.m., Thursday, March 28, 1946, the hearing in the above-entitled matter was closed.) [1626]

BOARD'S EXHIBIT No. 10
OR-1-R
AGREEMENT

This Agreement, dated....., 194...., is entered into between ..... (hereinafter referred to as the "Company") and the United Steelworkers of America on behalf of the members of Local Union ....., C.I.O., (hereinafter referred to as the "Union").

Witnesseth:

It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relations between the employees and the Company and to herein set forth the basic Agreement, covering rates of pay, hours of work, and conditions of employment to be observed between the parties hereto.

Section 1—Recognition:

A. The Company recognizes the Union as the sole collective bargaining agency for all its employees within the bargaining unit, as certified by the National Labor Relations Board.

B. Rival Organizations: The Company declares that it will pursue the firm policy of not aiding, or

supporting, in any manner whatsoever, any organization for the purpose of undermining the present Union.

C. New Employees: The Company shall inform, in writing, all new employees, at the time of hiring, that the Union is the sole and exclusive bargaining agency for all employees covered by this Agreement.

Section ....—Union Security:

1. So long as this agreement continues in effect, membership in the union shall be required as a condition of employment for all employees of the Company on the payroll as of this date and for all new employees hired by the Company during the continuance of this agreement, but the Company shall have the exclusive right to determine the source or sources of all applicants for employment and shall be the sole judge of their qualifications.

2. Each new employee, upon entering the service of the Company, shall be required to turn his union authorization and membership card over to the steward of his department for investigation.

Section 4—Check-off:

The following provision shall be incorporated into the Agreement between the parties:

A. In order to secure the increased production which will result from greater harmony between workers and employers and in the interest of increased cooperation between Union and Management which cannot exist without a stable and responsible Union, the parties hereto agree as follows:

V. The Union shall immediately furnish the Com-

pany with a list of its members in good standing the date of ..... The Company shall deduct from the first pay of each month the Union dues for that month of all members whose names appear on the notarized list, and who have not, within fifteen days after the date of ....., advised the Company and the Union, in writing, that they do not wish their dues deducted. Also, the Company shall deduct, for all employees who become members of the Union after the date of this agreement, from the first pay of each month the Union dues for that month. The Company shall promptly remit the dues to the Financial Secretary of the Union. The initiation fee, reinstatement fee, assessment, or other monies due the Union shall be deducted in the same manner as dues collections.

C. In order to enable the Company to comply with the foregoing provisions, the list of members in good standing of the Union to be furnished to the Company in accordance with the above paragraph shall show the name and, insofar as the information shall be available to the Union, the check number of each such member. Thereafter, on or before the last pay of each month, the Union shall submit to the Company a list showing the name of each employee who shall have become a member in good standing of the Union since the last previous list of members of the Union in good standing was furnished the Company and showing: (1) the amount of any initiation fee or re-instatement fee to be deducted from the wages of such employee for the succeeding month; (2) the first

month (which shall not be earlier than the month in which the list was submitted) in which Union dues are to be deducted from the wages of such employee in accordance with paragraph G. above. The Union shall also furnish to the Company a certificate of its President or other qualified officer showing the name and address of the Financial Secretary of the Union to whom the amounts so deducted are to be remitted.

D. The Union shall indemnify and save the Company harmless against any and all claims, demands, suits, or other forms of liability that shall arise out of or by reason of action taken or not taken by the Company in reliance upon certified lists furnished to the Company by the Union or for the purpose of complying with any of the provisions of this Section.

OR-1c-HW

Section ....—Hours of Work:

(a) The normal hours of work shall be eight (8) per day and forty (40) per week. The daily hours of work shall be consecutive except for such rest periods as may be provided in accordance with the practice established in the Company as mutually agreed to.

(b) The normal work day will be any regularly scheduled consecutive 24-hour period and will be computed from the time the employee starts work. A normal work week will be a calendar week beginning at 12:01 a.m. Monday or at the turn changing hour nearest to that time. The basis of rest in any twenty-four (24) hour period will be the

sixteen (16) hours following the regular eight (8) hours of work. Meal period excepted. The basis of rest in any week shall be all time in excess of forty (40) straight time hours in the calendar week.

(c) The five (5) straight time days of work shall be consecutive.

(d) Changes in the starting time of all shifts shall be made only after the Company has consulted with the Union's Labor Relations Committee.

(e) Overtime payments shall be made on the basis of either daily or weekly overtime hours worked but an employee shall not be paid both daily and weekly overtime for the same overtime hours worked. Hours worked in excess of eight (8) working hours in any one day and forty (40) per week in any one week shall be paid for at the overtime rate of one and one-half times the regular rate. Not withstanding the provisions above an employee working before or after the regular shift periods shall be paid overtime at the rate of one and one-half times the regular rate. Employees required to work on Saturday shall be paid at the overtime rate of one and one-half times the regular rate. Employees required to work on Sundays shall be paid overtime at twice the regular rate.

(f) Employees who are regularly scheduled or who are notified to report and who do report for work, shall be paid, in the event no work for which they were scheduled is available, for four (4) hours work at their regular rate of pay. Employees who are scheduled and report and actually begin work at the start of a shift and work less than four (4)

hours, shall be paid for a minimum of four (4) hours at their regular rate of pay. Employees who actually begin work on the second part of the shift shall receive eight (8) hours' pay provided they worked the first part of the day. At Management's discretion the employees scheduled or notified to report may be assigned to other substantially similar work for which they may be qualified in lieu of their being released. Should employees refuse such assignment, they shall not receive the four hours reporting pay.

When an employee is called to the plant for work in an emergency during his regular scheduled time off, he shall be guaranteed a minimum of four (4) hours' work or pay in lieu thereof at his overtime rate of pay.

(g) In the event that: Strikes, work stoppages in connection with labor disputes, breakdowns of equipment, or failure of utilities or acts of God, interfere with work being provided, or an employee is not put to work or is laid off after having been put to work, either at his own request or due to his own fault, the provisions of paragraph (f) section ...., do not apply. Also these provisions shall not apply in the event Management gives such reasonable notices as determined by Management of a change in schedule or reporting time and that the employee scheduled or notified to report for work need not report.

(h) In the event that: Strikes, work stoppages in connection with labor disputes, breakdowns of equipment, or failure of utilities or acts of God

interfere with work being provided, or an employee is not put to work or is laid off after having been put to work, either at his own request or due to his own fault, the provisions of above paragraph (t), do not apply. Also these provisions shall not apply in the event Management gives such reasonable notices, as determined by Management and the plant Grievance Committee, of a change in schedule or reporting time and that the employee scheduled or notified to report for work need not report.

Section ....—Wages:

A. Continuation of Wage Rates:

Hourly, incentive and piece-work rates in effect as of the date of this Agreement shall remain in effect for the duration of this Agreement except as changes may be permissible and accomplished under Paragraph B of this Section.

B. Rate Establishment and Adjustment:

It is recognized that changing conditions and circumstances may from time to time require the installation of new wage rates, adjustment of existing wage rates or modification of wage rate plans because of the creation of new jobs, development of new manufacturing processes, changes in equipment, changes in the content of jobs, or improvements brought about by the Company in the interest of improved methods and product. Under such circumstances the following precedure shall apply.

I. New Wage Rates for New Jobs.

When a bona fide new job or position is to be established:

a. Management will develop an appropriate hourly, incentive or piece-work rate.

b. The proposed rate will be explained to the grievance committee with the objective of obtaining its agreement to the installation of the proposed rate, or, to the installation of the proposed rate for an agreed upon period which will serve as a trial period. Management may thereupon install such rate. If the rate is installed without agreement, it shall subsequently be subject to adjustment as provided below:

c. When a wage rate for a new job is installed, the employee or employees affected may, at any time within ninety (90) days, (except where the parties otherwise mutually agree) file a grievance alleging that such new rate does not bear a fair relationship to other jobs in the same plant. Such grievance shall be adjusted under the grievance and arbitration machinery of this Agreement. If the grievance be submitted to the arbitration machinery, the decision shall be effective as of the date when the employee was assigned to the new job.

II. New Wage Rates for Changed Jobs.

When changes are made in equipment, method of processing, material processed, or quality or production standards which would result in a substantial change in job duties or requirements; or where over a period of time an accumulation of minor changes of this type have occurred which, in total, have resulted in a substantial change in job duties or

requirements, adjustments of hourly, incentive, piece-work and tonnage rates, may be required. In such cases new wage rates shall be installed in the following manner:

a. Management will follow the procedure outlined in I-a above. In addition, the rate proposal so developed will be fully explained to the Union representatives with the objective of obtaining their agreement to the proposal on the basis of equity. Negotiations may be instituted by the grievance committeeman representing affected employees or by Management. If subsequent rate studies are necessary, Management will acquaint the grievance committeeman or committee regarding such study and seek their cooperation. When the study has been completed and the proposed new wage rates computed, Management representatives will again confer with the committeeman or committee and fully explain the study. The procedure involved in explanation and negotiations will be that procedure outlined in Grievance Section..... of this Agreement with negotiations continuing through the successive steps of such procedure.

b. If Management and the Union representatives are unable to agree upon the new rate for the changed job, Management shall have the alternative of (1) establishing the new rate; (2) setting a temporary rate for a reasonable trial period. If Management elects to set the new rate for the changed job, the employee may file

a grievance at any time within ninety (90) days (except where the parties otherwise mutually agree) from the installation of the new rate, and any change in the rate so determined shall be retroactive to the date of the assignment of the employee to the changed job. If Management adopts the alternative of a trial period, the employee, during such trial period, shall be guaranteed his straight-time average hourly earnings for the three months immediately preceding the change in the job content. After the expiration of the trial period, the employee or employees affected may, at any time within thirty (30) days, file a grievance and any change in the rate so determined shall be retroactive to a date no earlier than the date of the assignment of the employee to the changed job but no later than the date immediately following the expiration of the trial period. Such grievance shall be adjusted under the grievance and arbitration machinery of this Agreement.

If any grievance under this paragraph b is submitted to the arbitration machinery, the decision shall be governed by the principle that the new rate shall be in line with other rates in the plant.

The details of applying this provision to cases in which an employee has worked at more than one job during the three months and to other exceptional situations shall be left to negotiations between the grievance committee

and Management. The grievance committee and Management may agree to the computation of guaranteed earnings on a group or departmental rather than an individual basis.

OR-2-W

Section ....—Wages:

All wage increases shall be effective as of August 18, 1945. All employees covered by this Agreement shall receive a 25c per hour increase for each hour worked under this Agreement. There shall be an increase of 25c per hour in all hourly rates for each occupational classification, and an equivalent increase in all piecework rates or incentive bonus rates which will result in an increase of 25c per hour. It is understood and agreed that in applying the above increase to pieceworkers the incentive workers, the present incentive or piecework rates shall remain in effect and said employees shall have added to their daily incentive or piecework average straight time hourly earnings, 25c per hour for each straight time hour worked. Hourly, incentive, or piece rates now in effect and as increased above shall remain in effect for the duration of this Agreement, except as changed in accordance with the provisions of said Agreement.

OR-1-NSB

Section ....—Night Shift Bonus:

Effective on ....., 194...., all employees for hours worked during the second shift shall receive a premium rate, in addition to their standard rate, of ten (10) cents per hour, and for hours worked

during the third shift a premium rate, in addition to the standard rate, of fifteen (15) cents per hour, where such hours are to be paid for on the basis of time and one-half or double time, the premium rate for the second or third shift shall be included in the rate of pay on the basis of which the time and one-half or double time shall be computed.

OR-1-HP

Section ....—Holidays:

The following days shall be considered holidays:

New Year's Day	Labor Day
Decoration Day	Thanksgiving Day
Independence Day	Christmas Day

All employees required to work on the above holidays shall be paid at twice their regular rate of pay.

In the event of a holiday shut down all employees shall be guaranteed a minimum of eight (8) hours pay at their regular rate of pay for such holiday.

When a recognized holiday falls on Sunday, and Monday is the day commonly observed for such holiday, such Monday shall be considered as the holiday and shall be paid for as such.

OR-la-S

Section ....—Seniority:

A. Seniority is defined as the length of an employees' service with the Company and it shall apply as to lay-off and rehiring throughout the plant of the Company.

B. It is understood and agreed that in all cases of promotion and demotion and increase or decrease of forces; the following factors shall govern: Seni-

ority shall prevail provided the employee is able to capably perform the work. In determining capability, training, skill, efficiency and experience shall be considered.

C. All new employees hired hereafter shall work thirty (30) calendar days before being placed on the seniority list.

D. Workers shall be given preference to work on either day or night shift in accordance with their Seniority status.

E. The employees seniority list shall give employees name, original hiring date, and all the occupations the employee has had experience on with the Company. Such seniority list shall be given by the Company to the Union once every six months.

Accumulated seniority shall be lost upon:

1. Justifiable discharge
2. Voluntary quitting
3. After having been laid off, the employee does not return to work within five (5) working days after date of mailing by registered mail written notice of recall to employment to the address appearing on the Company's records. The Company shall furnish the Union secretary a copy of the letter sent the employee at the same time the employee is notified to return to work.

Seniority can only be retained during this period by the employees notifying the Company each ninety (90) days that he is available for employment.

F. In the case of a decrease of forces, Local

Union officers and Grievance Committeemen shall be given preferential seniority providing they are capable of doing the available work.

OR-1-V

Section ....—Vacations:

a. Each employee who, from the date of hire, has been continuously in the employ of the Company for one (1) year or more shall receive two (2) weeks' vacation with pay.

b. Continuous service shall be determined by the employee's first employment in the plant of the Company and in accordance with the provisions for determination of continuous service as set forth in the Seniority section of this Agreement.

c. It is agreed that the intent of this Section is to provide vacations to eligible employees who have been consistently employed. Consistent employment shall be construed to mean the receipt of earnings in a minimum of 60% of the pay periods within the employees qualifying year.

d. Two (2) weeks vacation shall consist of fourteen (14) consecutive days; provided, however, that in the event the orderly operations of the plant require, the two (2) week's vacation may, by mutual agreement between the Company and the Union be taken in two (2) periods of seven (7) consecutive days each.

e. Each employee granted a vacation shall be paid at the employee's straight time average rate of earnings per hour for the first two (2) of the three (3) closed and calculated pay periods immediately preceding the employee's actual vacation period.

Hours of pay for each vacation week will be the average hours per week worked by the employee during the three month preceding the actual vacation period, but not less than forty (40) hours a week or the scheduled average work week of the plant, during the three months period preceding the vacation.

f. Promptly after January 1 of each calendar year each employee shall be requested to specify the vacation period he desires. Vacations will, so far as possible, be granted at times most desired by employees (longer service employees being given preference as to choice), but the final right to change such allotments, is exclusively reserved to the Company in order to insure the orderly operation of the plant.

g. If an employee is eligible for vacation as provided for in this Section and the employee's service is terminated by the Company for any reason prior to his vacation period, said employee shall receive at time of termination of service the actual amount of vacation pay due him as provided for in this Section.

Section ....—Grievance Procedure:

Should differences arise between the Company and the Union as to the meaning and application of this Agreement, or should any trouble of any kind arise in the plant there shall be no suspension of work of any kind on account hereof but the same shall be settled as promptly as possible in the following manner:

1. Between the aggrieved employee accompanied

by a member or members of the Grievance Committee designated by the Union and the foreman of the Department. The foreman shall give his answer to the grievance within forty-eight (48) hours.

2. Between members of the Grievance Committee, designated by the Union and the General Superintendent or Manager of the Plant. Matters to be so adjudicated, must be presented in writing by the aggrieved party, who may also be called upon for verbal testimony regarding the Grievance.
3. Between the Representatives of the International Organization of the Union, the Grievance Committee and Representatives of the Executives of the Company. Third Step meetings shall be held within ten (10) days after disagreement on the disposition of Grievance in the Second Step.

In the event of disagreement on an unsettled Grievance in Step 3, such grievance sall be sent to arbitration (in accordance with the arbitration provision of this agreement) within 10 days following receipt of either part from the other of a request that the grievance be arbitrated.

When grievances are not disposed of within the prescribed time in any step, unless an extension of time has been mutually agreed upon, they may be appealed to the next step.

Any member of the Grievance Committee shall have the right to visit departments other than his own at all reasonable times for the purpose of transacting the legitimate business of the Grievance

committee. The same right shall be accorded by the Management, to the Representative of the Union.

Step 4. If not then settled, the grievance shall be appealed to an impartial umpire, provided it is the type of case in which the umpire is authorized to rule. The umpire shall be appointed by two representatives of the Company and two representatives of the Union. The decision of the umpire shall be final, conclusive, and binding on both the parties. The expense incident to the service of the umpire shall be shared equally between the Company and the Union.

It shall be the functions of the umpire, within ten (10) days after submission of the case to him, to make a decision of all claims of discrimination for Union activity and membership and in all cases of alleged violation of the terms of this contract. The umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement and any agreements made supplementary hereto. But shall refer any such case back to the parties without any such decision. If the representatives of the Company and the Union are unable to agree on an umpire, as provided above, either the Company or the Union will request the United States Department of Labor, Division of Conciliation, for the appointment of an Umpire. Powers of the decision, of the Umpire, so appointed, shall extend only and be binding upon both the Company and the Union on the same basis as the umpire decision as provided for above.

Section ....—Grievance Record:

Grievances not adjusted by Step I shall be reduced to writing on forms provided by the Company (which shall be supplied with these forms by the Union) dated and signed by a member of the Union, and two copies given to the Foreman. The foreman will have inserted in the appropriate place on the form, his disposition of the matter, and will sign and date same, returning one (1) copy to the Grievance Committee or Committeeman within three (3) days. Such Grievances not settled in Step I (above) shall be discussed promptly at a mutually satisfactory time, but not later than the first succeeding regular meeting which shall be held not less than twice each month at the option of the Union, between the designated representative of Management and the Committee of the plant.

Grievances to be discussed at such regular monthly meeting shall be entered on agenda form by the Grievance Committee and the Management three (3) days before such meeting.

Union Grievances to be discussed at regular monthly meetings may be fully investigated by a member of the Grievance Committee who shall be afforded such time off, as may be necessary for purposes of such complete investigation of the Grievance which time off shall occur between the date of filing of the Grievance in Step I hereof, and the discussion at the meeting herein referred to. Minutes of all Step II Grievance meetings, shall be prepared by the Representative of the Management jointly signed by the Chairman of the Committee or the

Secretary of the Grievance Committee and the Representatives of Management and two (2) copies of such minutes shall be typed and be handed to the Union Chairman not later than ten (10) days following the date on which the meeting was held. The minutes shall conform essentially to the following outline:

a. Date and place of meeting.
b. Name and position of those present and those absent.
c. Identifying number and descriptions of each grievance discussed,
d. Brief statement of Union position.
e. Brief statement of Company position,
f. Abstract of important aspects of the discussion,
g. Decision reached,
h. Statement of concurrences in or, exceptions taken to decision,
i. Statement as to whether decision accepted or rejected.

OR-1-DC

Section ....—Discharge Cases:

In the exercise of its rights and functions, Management agrees that a member of the Union shall not be peremptorily discharged from and after date hereof, but that in all instances in which Management may conclude that an employee's conduct may justify suspension, such suspension shall not be more than five (5) calendar days.

During this period of initial suspension, the employee may, if he believes that he has been

unjustly dealt with, request hearing and a statement of the offense before the foreman, or the Manager of the Plant with a member or members of the Grievance Committee present as the employee may choose.

At such hearings the facts concerning the case shall be made available to both parties. After such hearing, Management may determine whether the suspension shall be converted into discharge dependent on the facts of the case, or that such suspension may be extended or revoked. If the suspension shall be revoked, the employee shall be returned to employment and receive full compensation at his regular rate of pay for time lost, but in the event a disposition shall result in either the affirmation, or extension of the suspension or discharge of the employee, the employee may, within five (5) days after such disposition, allege a grievance which shall be handled with the procedure for adjustment of grievances starting with Step 2. Final decision on all suspension or discharge cases shall be made by the Company within five days from the date of filing of the grievance, if any. Should it be determined by the Company, or by an umpire, in accordance with the grievance procedure that the employee has been suspended unjustly, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for time lost. Exceptions may be made where lesser settlement is mutually agreed to by the Company and the Union or awarded by the umpire upon the merits of the case.

Section ....—Recall to Employment:

Employees who have been temporarily laid off due to lack of work, shall furnish the Company with their proper mailing addresses and telephone numbers, if any, or with such telephone numbers, if any, where or at which they can be reached.

It is further agreed that all employees will at all times keep the Company advised with the information listed in the above paragraph.

The Company agrees to follow the following procedure in recalling an employee to work: Telephone or telegraph the employee at the telephone number or address furnished. If the employee or some person at his address is not reached in this matter, the Company will post a registered letter to his last known address. If the employee fails to report for work, or notify the Company of his intentions within five (5) days from the posting date of said registered letter, the Company shall have the right to assume that the employee has voluntarily quit and shall be relieved of all further responsibility.

The Company shall present the Union with a copy of all registered letters recalling employees at the time such letters are sent.

OR-1-V

Section ....—Benefits and Privileges:

Employees receiving benefits, condition or privileges above the minimum provided for herein shall not have the same reduced by reason of the signing of this Agreement but shall continue to enjoy same.

Section ....—Leave of Absence:

Upon request, an employee may be granted a leave of absence, but in no case shall same be issued for more than six (6) months, without an extension agreement between the employee and the Management and the Union.

No employee shall accept other employment during the leave of absence period without the consent of the Company and the Union, except as specified below.

Those employees only on leave of absence who fail to report for work on or before the date of expiration shall forfeit their seniority rights and will be taken off the seniority list.

If sickness or accident prevents an employee from reporting he may retain his seniority by notifying the Company.

Leaves of absence extending for more than two (2) weeks must be given in writing.

Leave for Union Officers and Delegates:

Any employee selected by the Union as a delegate of a convention, conference, or for other official Union business shall be given the necessary leave of absence and without pay.

Any local Union officer who is an employee of the Company shall be given, upon his request, a leave of absence not to exceed a period of two years for the purpose of working for that such leave of absence shall not constitute any break in the employee's record of continuous service and the period of leave of absence shall be included in such record of continuous service.

OR-1-VET

Section ....—Veterans:

Any veteran of the recent war who was not employed by any person or company at the time of his entry into the service of the land or naval forces or the merchant marine of the United States, and who is hired by this Company after he is relieved from training and service in the land or naval forces or at the completion of service in the merchant marine, shall, upon having been employed for the probationary period provided for all new employees in this Agreement, and not before, receive seniority credit for the period of such servive subsequent to September 1, 1940, provided:

(1) Such veteran shall apply for and obtain such employment within ..... months from the time he is relieved from such training and service in the land or naval forces or the time of his completion of his service in the merchant marine, it being agreed that if such veteran is unable to work by reason of physical disability during said period of ..... months, his application may be made within ninety (90) days from the time his disability has ended.

(2) Such veteran shall not have previously exercised this right in this or any other plant of the Company.

(3) Such veteran shall not be employed for the purpose of bringing about the displacement of another worker.

(4) A veteran so employed shall submit his service discharge papers to the Company at the end of the aforesaid probationary period of employment and the Company shall place thereon in permanent form a statement showing that the veteran has exercised this right, such statement to be signed by representatives of the Company and the Union.

Veteran's Committee:

A Veterans' Committee, consisting of equal representatives of the Company and the Union shall be set up in each plant. All problems relating to veterans that are not disposed of under the terms of this contract shall be presented to the veterans' committee. Under sponsorship of the veterans' committee, the Company shall undertake a training program for disabled veterans so as to place them in jobs that are agreeable to the veterans.

An employee veteran, when reinstated, shall be entitled to his former rate of pay with accrued adjustments that would have been his had he continued in employment.

OR-1-ML

Section ....—Military Leave:

(1) Right to Position: Any employee or former employee who subsequent to May 1, 1940, shall have entered upon or may hereafer enter upon active military or naval service in the land or naval forces of the United States (including reserve components thereof) or, before the termination of the unlimited National emergency declared by the President on

May 27, 1941, service in the United States Merchant Marine and who in order to perform such service has left or leaves a position other than a temporary position, in the employ of the Company and who,

(a) Receives a certificate of satisfactory completion of his military or naval training and service or a certificate of completion of a period of substantially continuous service in the merchant marine:

(b) is still qualified to perform the duties of such position: and

(c) makes application for reemployment within ninety (90) days after he is relieved from such training and/or service or from hospitalization continuing after discharge from military service for a period of not more than one year,

shall be restored to such position or a position of like seniority, status and pay, unless the Company's circumstances have so changed as to make it impossible or unreasonable to do so.

Section ....—Safety and Health:

The Company shall continue to make reasonable provision for the Safety and Health of it's employees during the hours of their employment. Protective devices, goggles, gloves, fire and waterproof clothes, and other articles necessary to properly safeguard the health of employees and protect employees from injury shall be provided by the Company. Proper heating and ventilating systems shall be installed by the Company where needed.

A Safety Committee shall be formed consisting

of three (3) employees covered by this Agreement selected by the employees and three (3) Company Representatives. This Committee shall meet at least once every month. Time spent by such Committee in excess of four (4) hours in any month must be approved by the Company. Recommendations of this Committee shall be acted upon. In cases of disagreement, said cases shall be subject to the established grievance procedure. All safety and health rules established by this Committee shall be observed by all employees.

OR-1-BB

Section ....—Miscellaneous:

The Company shall grant the Union the right to place Bulletin Boards in an agreed place in the plant covered by this Agreement, for the purpose of posting copies of this Agreement, official papers and notices of Union meetings.

Written communications pertaining to the activities of the Union may be distributed by the Union in the shop by placing such communications in a box supplied by the Company for that purpose, located near the gate.

A. Contracting of Work in Plant

The employees covered by this Agreement shall be given preference for any work performed in or about the plants.

B. Working Foremen.

The Company agrees that it will not allow Management representatives, foremen with the right to hire or fire, or any other person

excluded by this Agreement, to do any physical labor that will take any work away from the regular employees, unless it be for reasons beyond the control of the Company.

OR-1-T

Section ....—Amendment or Termination:

The terms and conditions of this Agreement shall continue in effect until ....., and shall continue in effect thereafter until changed or terminated as follows:

(a) Either party may at any time after ....., 194...., and from time to time thereafter, give thirty (30) days written notice to the other party of the time for the commencement of a conference of the parties for the purpose of negotiating the terms and conditions of a change of this Agreement, and

(b) If, because of failure to agree, this Agreement is not changed by a written Agreement entered into by the Company and the Union within thirty (30) days from the giving of said notice, then this Agreement and all of the provisions thereof, may be terminated by either party as follows: Either party may serve on the other party a specific notice of termination of this Agreement. This Agreement shall then be terminated upon the expiration of thirty (30) days from the giving of said termination notice.

(c) Either party hereto may, however, at any time but not more often than once every six

(6) months, reopen this Agreement for the purpose of negotiating a change in the wage schedule upon the service of written notice thirty (30) days previous to commencement of negotiations.

Notice hereunder shall be given by registered mail, be completed by and at the time of mailing, and if by the Company be addressed to the United Steelworkers of America, 4110 East Slauson Avenue, Maywood, California, and if by the Union, be addressed to the Company at ..... Either party may, by like written notice change the address of which registered mail notice to it shall be given.

Section ....—Sick Leave

Each employee who, as of this date of this Agreement and of each subsequent calendar year during the life of this contract, has been continuously in the employ of the Company for one but less than three (3) years shall be entitled during such calendar year to seven (7) days of sick leave with pay, and every employee who has been continuously in the employ of the Company for three (3) or more years shall be entitled to fourteen (14) days of sick leave with pay. Before any employee shall be entitled to the benefits of sick leave he shall present a certificate signed by doctor stating facts of his illness.

The determination of the length of continuous employment and the rate of pay applicable for each employee shall be made in accordance with the provisions of this contract covering Vacations.

Section. .—Group Insurance:

The Company shall institute and maintain uniform group insurance plans, the master policies issued by the insurance companies to be attached and made part of the collective bargaining contracts, providing the followinng benefits.

(a) Life, accidental death and dismemberment insurance in a face amount equal to 75 per cent of average annual earnings, with a minimum coverage of $1,500.

(b) Disability insurance with benefits of 25 per cent of weekly average earnings payable for 13 weeks for each disability.

(c) Hospitalization and surgical benefits covering workers and dependents for 21 days at $6 per day each disability, hospital facilities to the extent of $50 and surgical costs to the extent of $150.

The plan shall be operated under joint union-management administration. Provisions shall be made for continued insurance of employees during periods of layoff unless employment is secured elsewhere. More advantageous terms in any existing plan shall not be reduced.

[Endorsed]: Filed March 18, 1946.

BOARD'S EXHIBIT No. 12-A

Name	Classification
Aguna, Phillip (b)	Spot Welder
Ahlf, Harold (b)	Maintenance Mechanic
Alatorre, Joe (b)	Assembler
Aldridge, Frank (b)	Molder
Allen, John (b)	Stock Room
Angona, Agnes (b)	Core Filer
Angona, Elmer (b)	Molder
Aparato, Joseph (b)	Material Handler
Arent, Lester (b)	Repair & Inspection
Arlotti, Joe (b)	Machinist
Armendariz, Guillermo (b)	Assembler
Armijo, Jose (b)	Power Press Operator
Avenatti, Dominick (b)	Tool & Die Maker
Avila, Jose (b)	Dipper
Bachman, Fred (b)	Tool Crib Attendant
Baker, Gustave (b)	Carpenter
Balthazar, William (b)	Janitor
Baltierra, Mauro (b)	Dipper
Barbosa, Fausto (b)	Sprayer
Barbosa, Frank (b)	Sheetmetal Worker
Barton, Lanson (b)	Machinist
Bennett, Howard (b)	Material Checker
Bennett, William (b)	Unit Repairman
Bent, George (b)	Core Baker
Beronda, Ross (b)	Outside Range Service
Billy, Owen (b)	General Helper
Blaser, Frank	Machinist
Blevins, Francis (b)	Molder
Boase, Samuel (b)	Outside Service
Bonura, Tony (b)	Assembler
Bowell, Calvin (b)	Crater - Carpenter
Boyd, Harold (b)	Floor Man
Bratley, Theodore (b)	Outside Service
Bria, Jimmie (b)	Machinist "B"
Bryant, Jesse (b)	Stock Room
Burrola, Joseph (b)	Machinist
Bury, Ralph (b)	Sheetmetal Patternmaker
Bush, O'Neal T. (b)	Dipper
Busse, Carl (b)	Electrician

Name	Classification
Candelaria, Marcos (b)	Painter
Cano, Jesus (b)	Turret Lathe Operator
Carlsen, Otto B. (b)	Tool & Die Maker
Carrasco, Joseph (b)	Power Press Operator
~~Carrillo, Robert~~	Arc Welder
Carroll, Henry (b)	Tool & Die Maker
Carroll, Moses B. (b)	Shear Operator
Castron, Jules (b)	Dipper
Castron, Peter (b)	Enamel
Cazares, Andres (b)	Carpenter, Crater
Chance, Verne (b)	Unit Repairman
Chittock, Reuben	General Conversion Work
Christensen, Martin (b)	Outside Service
Chulich, Steve (b).	Janitor
Clark, Wallace (b)	Sheetmetal Wkr. Hlpr.
Clements, Van (b)	Molder
Conrad, Harry (b)	General Mechanic
Cooper, Harry (b)	Tool & Die Maker
Coring, Otsie (b)	Lot Labor
Corrales, Bernadino (b)	Foundry Helper
Crews, Ralph (b)	Molder
Crittendon, Gerald (b)	Material Handler
Cruz, Vicente (b)	Molder
Cuccia, Joe (b)	Material Handler
Cuccia, Liborio (b)	General Conversion Work
Cueto, Pete	Electrician
Cummings, Charles	Maintenance
Cunningham, Hubert 9 [ch]	Assembler
Dalby, Stewart (b)	Helper, Carpenter
Daly, Milton	Engine Lathe Operator
Davis, Preston (b)	Conveyor Loader
Davis, Will (b)	General Conversion Work
Dawson, Harold (b)	General Conversion Work
DeGruccio, Lewis (b)	Molder
De Hart, John (b)	General Conversion Work
Depetro, Ross (b)	Assembler
De Rose, Joseph (b)	General Conversion Work
Diller, Isak (b)	Janitor
Dominquez, Manuel (b)	Power Press Operator
Doren, Arthur (b)	Carpenter

Name	Classification
Doyle, Frank (b)	Parts Stock Room
Drisker, Sam (b)	Cupola Loader
Dufau, Angel (b)	General Conversion Work
Dunn, Fred (b)	Spot Welder
Dunn, Leon (b)	Carpenter
Dyer, Nina (b)	Coremaker
Edwards, Dell G. (b)	Carpenter
Elias, Joe (b)	Power Press Operator
Elizalde, Pete (b)	Shake out & Sandcutter
Elizalde, Rosalio (b)	Janitor
Emard, Leo (b)	Material Handler
Enger, Frank 9 (b)	Crater Carpenter
Erickson, Lynas (b)	Crater Carpenter
Estrada, Justo (b)	Power Press Operator
Estrada, Virginia (b)	Coremaker
Ewert, John (b)	Tool & Die Maker
Fairchild, Mel (b)	General Conversion Work
Falzone, Joseph (b)	Lot Laborer
Fata, Charles (b)	Grinder
Feola, Ralph (b)	General Conversion Work
Ferrendeli, Victor (b)	Tool & Die Maker
Finner, Reinhold (b)	Foundry Laborer
Fitz, Roy (b)	Carpenter
Flores, Felix (b)	Lot Laborer
Floyd, Laverne (b)	Sheetmetal Patternmaker
Fost, Gilbert (b)	Assembler
Foster, Lambert (b)	Carpenter
Franco, Francisco (b)	Core Room Helper
Fraser, Howard (b)	Machinist
Fugarino, Henry (b)	General Helper
Fuller, Graydon (b)	Outside Service
Gabaldon, Juan (b)	Cupola Loader
Galewick, Vincent (b)	Unit Repairman
Galvin, Arthur (b)	Pickler
Gandara, Pietro (b)	Grindo
Garcia, Guadulupe (b)	Braker Operator
Garcia, Santiago	Drill Press Operator
Garcia, Ysabel	General Conversion Work
Gardea, James (b)	Crane & Shear Operator

Name	Classification
Garland, Enoch (b)	Outside Service
Gattoni, Charles (b)	Arc Welder
Gattoni, William (b)	Arc Welder
Gaudio, Cecilia	Core Filer
Ghiotto, Henry (b)	Carpenter
Gomez, Jose (b)	Lot Laborer
Gonzales, John (b)	Shear Operator
Gonzales, Joe (b)	Unit Repair Helper
~~Gonzales, Santos~~	Power Press Operator
Graham, Vester (b)	General Conversion Work
Granado, Lorenzo (b)	Material Handler
Grant, Patrick (b)	Carpenter
Gray, Frank (b)	Dipper
Gray, James (b)	Arc Welder
Grego, Carl	Maintenance
Guardado, Ceserio (b)	Coremaker
Gutierrez, George (b)	General Conversion Work
Hainey, Glade (b)	General Conversion Work
Hale, Lorraine (b)	Core Filer
~~Hart, Frank~~	General Conversion Work
Hart, George (b)	Carpenter
Hatcher, Floyd (b)	General Conversion Work
Henry, Frank (b)	Dipper
Hentschel, Al (b)	Outside Service
Hernandez, Sylvestre8 (b)	Sandblaster
Hester, George (b)	Arc Welder
Holguin, Manuel (b)	Drill Pr. Opr.
Holguin, Valentine (b)	Foundry Helper
Homotoff, Nick (b)	Cupola Tender
Hopper, Cecil (b)	General Conversion Work
Ibbs, Chester	Tool & Die Maker
Imboden, Malcolm (b)	Tool & Die Maker
Jackson, Bert	Janitor
Jacob, Leon (b)	Arc Welder
Jager, Charles (b)	Machinist
James, Howard (b)	Carpenter Helper
Jenkins, Harold	Turret Lathe Operator
Johns, Leonard	Machinist
Johnson, John (b)	Grinder

Name	Classification
Jordan, Raymond (b)	Shear Opr.
Juarez, Salvadore (b)	Wheelabrator Opr.
Kaplan, Morris (b)	Material Handler
Kapy, Edward (b)	Outside Service
Karrasch, Carl	Sheetmetal Worker Helper
Keemer, Oscas (b)	Electrician
Kelly, Castor (b)	Carpenter Crater
Kelly, Harold (b)	Unit Repairman
Kidd, Ray (b)	Painter
Kieffer, Paul (b)	Outside Service
Kline, Joseph (b)	Sheetmetal Patternmaker
Kramer, William (b)	Carpenter

(b) Checked with blue mark.

[Endorsed]: Filed March 21, 1946.

BOARD'S EXHIBIT No. 12-B

Name	Classification
Labry, Ercelle (r)	Spot Welder
Lahey, Bruce (r)	Millman
Langos, Edward (r)	Tool & Die Maker
Lara, Gilberto (r)	Shaker out & Sandcutter
Larker, Basil (r)	Carpenter
Latona, Mike* (r)	
Lawson, James (r)	Molder
Leonard, Deward (r)	General Conversion Work
Letsch, Adolph (r)	General Conversion Work
Lightford, Earl (r)	Carpenter
Livingston, Arthur (r)	Carpenter
Lockhart, Frank (r)	Millwright
Lopez, Maximo (r)	Power Press Operator
Lopez, Pete (r)	Drill Press Operator
Loquet, Edward (r)	General Conversion Work
Lorsch, Allen (r)	Die Setter
Lovell, William (r)	Grinder
Lucado, Raymond	General Conversion Work
Lugo, Florencio (r)	Tool & Die Maker
~~Lunsford, James W.~~	General Conversion Work

Name	Classification
Malone, Mizel (r)	Grinder
Marquez, John (r)	Drill Press Operator
Martin, Tony (r)	Stock Room
Martinez, Eulalio (r)	Drill Press Operator
Martinez, Pedro (r)	Molder
Mass, Albert (r)	Electrician
Maxey, Delmar (r)	Molder
May, Fred S. (r)	General Conversion Work
Mecartea, Rowland (r)	General Conversion Work
Meli, Robert (r)	General Conversion Work
Mendoza, Richard (r)	General Conversion Work
Mercado, John (r)	Outside Service
Metoyer, Frank R. D., Jr. (r)	Material Handler
Metoyer, Raymond (r)	General Conversion Work
Metz, Joseph (r)	Tool & Die Maker
Mild, John (r)	Outside Service
Miles, Edgar (r)	General Conversion Work
Miller, Dale (r)	Carpenter - Crater
Moore, Augustus	Core Room Helper
Moore, John (r)	General Conversion Work
Morrison, Frank E. (r)	Sheetmetal Worker
Morton, Christian (r)	General Conversion Work
Mosley, William* (r)	
Moss, Brandon J. (r)	Outside Service
Muoio, Joseph (r)	Molder
Muthler, Aloysious (r)	Painter
McArthur, Charles (r)	General Conversion Work
McCampbell, Everett (r)	Arc Welder
McClellan, Frank (r)	Pickler
McCollum, Curtis (r)	Carpenter
McKean, Robert (r)	General Conversion Work
McMillan, Ira (r)	Crane Operator
McMillan, Mae (r)	Janitress
McNinch, Civilin (r)	Machinist
McWilliams, Daphine (r)	Coremaker
Nevarez, Richard (r)	Arc Welder
Ocampo, Alfonso, Jr. (r)	General Conversion Work
Ortega, Louis (r)	Arc Welder
Oshann, Eugene J. (r)	Carpenter, Crater

Name	Classification
Padilla, Felipe (r)	Coremaker
Pardo, Bennie (r)	Power Press Operator
Pardo, Charles (r)	Die Setter
Partipilo, Nicolontonio (r)	Power Press Operator
Patton, Irene (r	Coremaker
Peguero, Alberto (r)	Shear Operator
Pena, Gregorio (r)	Power Press Operator
Perez, Medardo (r)	General Conversion Work
Perry, John (r)	General Conversion Work
Pitts, George (r)	Tool Grinder
Potekean, Shirley (r)	Coremaker
Prandini, Paul (r)	Oiler
Pritchard, Louis (r)	Unit Repairman
Puga, Edward (r)	Breaker Operator
Quintana, John	General Conversion Work
Raabe, George (r)	Casting Inspector
Radogna, Louis (r)	General Conversion Work
Radogna, Nick (r)	General Conversion Work
Raga, John	Die Setter
Ramirez, Joe (r)	Molder
Ramirez, Rafael (r)	Janitor
Ramos, Frank (r)	Power Press Operator
Rand, Charles (r)	Carpenter
Ray, Elizabeth (r)	Coremaker
Ream, Leon (r)	Painter
Regalado, Benny (r)	General Conversion Work
Regalado, Fabian (r)	Janitor
Rendon, Jose	Coremaker Helper
Reyes, Robert (r)	Electrician
Riboli, Giovanni (r)	Power Press Operator
Ricard, William (r)	General Conversion Work
Rice, Flaud (r)	Millwright
Rico, Raul	Shear Operator
Rios, Leonard (r)	Spot Welder
Roberts, Aloysius (r)	General Conversion Work
Robledo, Rogelio (r)	Shear Helper
Robles, Edward (r)	General Conversion Work
Robles, Joe (r)	Unit Repairman Helper
Rodriguez, Joe (r)	Power Press Operator
Rohe, Edwin (r)	Janitor

Name	Classification
~~Rolling, Frankie~~	Coremaker
Romano, Joseph (r)	General Conversion Work
Romero, Louis (r)	Power Press Operator
Roque, Lee (r)	General Conversion Work
Rosales, Simon (r)	Coremaker
Rosas, Tony (r)	Machinist
Rosen, Charles (r)	Janitor
Royere, Pierre H. (r)	Arc Welder
Ruiz, Castulo (r)	Sheetmetal Worker
Ruiz, Felix (r)	Arc Welder
Ruiz, Jose (r)	Laborer
Rymer, Marina (r)	Coremaker
Salazar, Alfred (r)	Molder
Salerno, Frank	General Conversion Work
Sanchez, Joseph (r)	Power Press Operator
Santos, Philip (r)	Shear Operator
Scavo, August (r)	General Conversion Work
Scavo, Joe	Sheetmetal Worker
Sciortino, William (r)	Coremaker
Serar, Rudolph (r)	General Conversion Work
Serna, Enrique	General Conversion Work
Sers, Joseph (r)	General Conversion Work
Silva, Frank	General Conversion Work
Silva, Louie (r)	Drill Press Operator
Simard, John (r)	Molder
Smith, Albert (r)	Power Press Operator
Smith, Roosevelt (r)	Janitor
~~Sobzhak, Fred~~	Carpenter
Solorsano, John (r)	General Conversion Work
Spallino, Charles (r)	General Conversion Work
Spallino, Tony (r)	General Conversion Work
Stalsworth, Jack (r)	Maintenance Mechanic
St. Clair, Clarence (r)	Unit Repairman
Stell, Cal (r)	Molder
Stiles, Max E. (r)	Unit Repairman
Sulli, John (r)	General Conversion Work
Terrazas, Joe (r)	Laborer
Telesio, Eugene (r)	Molder
Thomas, Tony (r)	General Conversion Work
Thomas, Vincent (r)	General Conversion Work

Name	Classification
Thomason, Earvin (r)	General Conversion Work
Torres, Apolinar	Grinder
Traslavina, Jose (r)	Power Press Operator
Trayer, Charles (r)	Maintenance Machinist
Trenholm, Max (r)	Machinist
Troost, Carl (r)	Sheetmetal Worker
Trujillo, Lucas—ch*	
Usher, Ernest	Outside Service
Usher, Earl (r)	Outside Service
Vaicaro, Dominic	Tool & Die Maker
Vaicaro, Frank (r)	Drill Press Operator
Valdez, Francisco (r)	Oiler
Van Noate, George (r)	Outside Service
Vasquez, Apolinor (r)	Foundry Helper
Vega, Jimmy (r)	Carpenter's Helper
Vega, Victor (r)	Power Press Operator
Vidas, Frank (r)	Carpenter's Helper
Vigil, Augustine (r)	Molder
Vigna, Joe (r)	General Conversion Work
Wackeen, John G. (r)	Sheetmetal Patternmaker
Wackeen, Walter	General Conversion Work
Walblom, Carl (r)	Electrician
Waterfield, Curtis (r)	Molder
White, Stephen (r)	General Conversion Work
Williams, Annison (r)	Millwright Helper
Williams, John (r)	Janitor
~~Wilson, Dale~~	Electrician Helper
Wood, William F. (r)	Janitor
Woods, George (r)	Janitor
~~Worrall, Ernest~~	General Reconversion Work [formerly a pattern maker helper]*
Wuopio, Walfred (r)	Power Press Operator
Zacarias, Peter (r)	Welder's Helper
Zamora, Adolfo (b)	Core Oven Tender
Zoldack, Andrew (r)	Unit Repairman
On Payroll of Service Inc:*	
Leonard, Len C.	Truck Driver Helper
Scavo, Frank—ch (r)	Truck Driver [Service Inc.]*
Muckridge, Shelly	Truck Driver
Sweeton, Clyde—ch (r)	Truck Driver

Name	Classification
Vick, Jimmie M.—ch	Floorman
Cerda, Joe C.	Truck Driver
Ray H. Steen—ch (r)	Material Handler
John Kettle	Truck Driver

[In Red Pencil] on challenge.

*Written in pencil.
(r) Checked with red mark.

[Endorsed]: Filed March 21, 1946.

BOARD'S EXHIBIT NO. 14

CERTIFICATE OF BUSINESS FICTITIOUS FIRM NAME

The undersigned do hereby certify that they are conducting a manufacturing business at 1221 Los Palos Street, Los Angeles, California, under the fictitious firm name of Pioneer Electric Co., and that said firm is composed of the following persons, whose names in full and places of residence are as follows, to-wit:

Robert J. Merritt, 111 N. Las Palmas Avenue, Los Angeles.

Willis J. Boyle, 511 N. Muirfield Road, Los Angeles.

Louis M. Boyle, 155 S. Hudson Avenue, Los Angeles.

Witness our hands this 15th day of August, 1942.

/s/ ROBERT J. MERRITT
/s/ WILLIS J. BOYLE
/s/ LOUIS M. BOYLE

State of California,
County of Los Angeles—ss.

On this 15th day of August, 1942, before me, Cecil W. Collins, Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Robert J. Merritt, Willis J. Boyle and Louis M. Boyle, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same. In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] /s/ CECIL W. COLLINS
Notary Public in and for said County and State.
My Commission expires September 18, 1946.

[Endorsed]: Filed Oct. 15, 1942.

AFFIDAVIT OF PUBLICATION

Los Angeles Enterprise
131 North Broadway, MUtual 4212
Date of First Publication, October 16, 1942.
Certificate of Business
Pioneer Electric Co.

State of California,
County of Los Angeles—ss.

M. Pedicini, of the County of Los Angeles, State of California, being duly sworn, makes oath and says:

That I am and at all times herein mentioned was a citizen of the United States of America, over

the age of eighteen years and not a party to nor interested in the above entitled matter; that I am the principal clerk of the printer and publisher of Los Angeles Enterprise, a newspaper of general circulation, printed and published weekly in said County and which newspaper is published for the dissemination of local news and intelligence of a general character, and which newspaper at all times herein mentioned had and still has a bona fide subscription list of paying subscribers, and which newspaper has been established, printed and published in the said County of Los Angeles for a period exceeding one year; that the notice, of which the annexed is a printed copy, has been published in the regular and entire issue of said newspaper, and not in any supplement thereof, on the following days, to wit: Oct. 16, 23, 30, and Nov. 6, 1942.

/s/ M. PEDICINI

Subscribed and sworn to before me this 6 day of November, 1942.

[Seal] /s/ WM. R. LATTA,
Notary Public in and for said County and State.

Copy of Notice
Certificate of Business
Fictitious Firm Name

The undersigned do hereby certify that they are conducting a manufacturing business at 1221 Los Palos Street, Los Angeles, California, under the fictitious firm name of Pioneer Electric Co., and that said firm is composed of the following persons, whose names in full and places of residence are as follows, to-wit:

Robert J. Merritt, 111 N. Las Palmas Avenue, Los Angeles.

Willis J. Boyle, 511 N. Muirfield Road, Los Angeles.

Louis M. Boyle, 155 S. Hudson Avenue, Los Angeles.

Witness our hands this 15th day of August, 1942.

ROBERT J. MERRITT
WILLIS J. BOYLE
LOUIS M. BOYLE

State of California,
County of Los Angeles—ss.

On this 15th day of August, 1942, before me, Cecil W. Collins, Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Robert J. Merritt, Willis J. Boyle and Louis M. Boyle, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] /s/ CEIL W. COLLINS,
Notary Public in and for said County and State.
My Commission expires September 18, 1946.

Date of 1st publication Oct. 16, 1942.
(15996-11-6)

[Endorsed]: Filed Nov. 6, 1942.

Certificate of Business
Fictitious Firm Name

The undersigned do hereby certify that they are conducting a manufacturing business at 1221 Los Palos Street, Los Angeles, California, under the fictitious firm name of Pioneer Electric Co., and that said firm is composed of the following persons, whose names in full and places of residence are as follows, to-wit:

Robert J. Merritt, 111 N. Las Palmas Avenue, Los Angeles, California.

Robert J. Merritt, Jr., 111 N. Las Palmas Avenue, Los Angeles, California.

Willis J. Boyle, 511 N. Muirfield Road, Los Angeles, California.

Louis M. Boyle, 155 S. Hudson Avenue, Los Angeles, California.

Witness our hands this 1st day of Jan., 1944.

/s/ ROBERT J. MERRITT
/s/ ROBERT J. MERRITT, JR.
/s/ WILLIS J. BOYLE
/s/ LOUIS M. BOYLE

State of California,
County of Los Angeles—ss.

On this 1st day of Jan., 1944, before me, Cecil W. Collins, Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Robert J. Merritt, Robert J. Merritt, Jr., Willis J. Boyle and Louis M. Boyle, known to me to be the persons

whose names are subscribed to the within instrument, and acknowledged to me that they executed the same. In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] /s/ CECIL W. COLLINS,
Notary Public in and for said County and State.
My Commission expires September 18, 1946.

[Endorsed]: Filed Jan. 28, 1944.

Affidavit of Publication

Los Angeles Enterprise
131 North Broadway MUtual 4212
Date of first publication February 4, 1944

CERTIFICATE FOR TRANSACTION OF BUSINESS UNDER FICTITIOUS NAME PIONEER ELECTRIC CO.

State of California,
County of Los Angeles—ss.

H. J. Scarlett of the County of Los Angeles, State of California, being duly sworn, makes oath and says:

That I am and at all times herein mentioned was a citizen of the United States of America, over the age of eighteen years and not a party to nor interested in the above entitled matter; that I am the principal clerk of the printer and publisher of Los Angeles Enterprise, a newspaper of general circulation, printed and published weekly in said County and which newspaper is published for the dissemination of local news and intelligence of a general

character, and which newspaper at all times herein mentioned had and still has a bona-fide subscription list of paying subscribers, and which newspaper has been established, printed and published in the said County of Los Angeles for a period exceeding one year; that the notice, of which the annexed is a printed copy, has been published in the regular and entire issue of said newspaper, and not in any supplement thereof, on the following days, to wit: February 4, 11, 18, 25, 1944.

/s/ H. J. SCARLETT.

Subscribed and sworn to before me this 25 day of February, 1944.

[Seal] M. PEDICINI,
Notary Public in and for Said County and State.

Certificate for Tranaction of Business Under Fictitious Name

The undersigned do hereby certify that they are conducting a manufacturing business at 1221 Los Palos Street, Los Angeles, California, under the fictitious firm name of Pioneer Electric Co., and that said firm is composed of the following persons, whose names in full and places of residence are as follows, to-wit:

Robert J. Merritt Jr., 111 N. Lts Palmas Ave., L. A., Calif.

Robert J. Merritt, 111 No. Las Palmas Ave., L. A., Calif.

Willis J. Boyle, 511 N. Muirfield Road, L. A., Calif.

Louis M. Boyle, 155 S. Hudson Avenue, L. A. Calif.

Witness our hand this 1st day of Jan., 1944.

ROBERT J. MERRITT
ROBERT J. MERRITT JR.
WILLIS J. BOYLE
LOUIS M. BOYLE

State of California,
County of Los Angeles—ss.

On this 1 day of Jan. A.D. 1944, before me, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Robert J. Merritt, Robert J. Merritt, Jr., Willis J. Boyle, Louis M. Boyle, known to me to be the persons whose names subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CECIL W. COLLINS,
Notary Public in and for Said County and State.

My commission expires Sept. 18, 1946.

Filed Jan. 28, 1944.

J. F. MORONEY,
County Clerk.
By H. E. STEVENS,
Deputy.

Date of 1st publication Feb. 4, 1944.

(20215-2-25)

[Endorsed]: Filed Feb. 24, 1944.

Certificate of Business
Fictitious Firm Name

The Undersigned do hereby certify that they are conducting a manufacturing business, with the principal office for the transaction of the business at 3700 East Olympic Boulevard, Los Angeles, California, under the fictitious firm name of Pioneer Electric Company, and that said firm is composed of the following persons, whose names in full and places of residence are as follows, to-wit:

W. G. Durant, 1245 Wentworth, Pasadena, California.

R. J. Merritt, 111 N. Las Palmas Avenue, Los Angeles, California.

R. J. Merritt, Jr., 111 N. Las Palmas Avenue, Los Angeles, California.

Louis M. Boyle, Ojai, California.

Marion Jenks, 511 N. Muirfield Road, Los Angeles, California.

W. J. O'Keefe, 845 S. Keniston, Los Angeles, California.

L. J. Mitchell, 1117 Story Place, Alhambra, California.

Witness our hands this 23rd day of November, 1945.

PIONEER ELECTRIC
COMPANY.
W. G. Durant
R. J. Merritt
R. J. Merritt Jr.
Louis M. Boyle

Marion Jenks
W. J. O'Keefe
L. J. Mitchell
By /s/ W. G. DURANT.

State of California,
County of Los Angeles—ss.

On this 23rd day of November, 1945, before me, Cecil W. Collins, Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared W. G. Durant, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ CECIL W. COLLINS.
My commission expires September 18, 1946.

[Endorsed]: Filed Nov. 28, 1945. J. F. Moroney, County Clerk. By M. E. Morin, Deputy.
Filed by Daily Journal

Affidavit of Publication of
The Los Angeles Daily Journal
and The Los Angeles News
121 North Broadway MUtual 6354
Los Angeles 12, California
Dec. 20, 1945.

State of California,
County of Los Angeles—ss.
M. B. Kelley of the County of Los Angeles, State

of California, being duly sworn, makes oath and says:

That I am and at all times herein mentioned was a citizen of the United States of America, over the age of eighteen years and not a party to nor interested in the above entitled matter; that I am the principal clerk of the printer and publisher of The Los Angeles Daily Journal and The Los Angeles News, that said newspaper is a newspaper of general circulation printed and published daily, except Sundays, in the City and County of Los Angeles; that the Certificate of Business Fictitious Firm Name of which the annexed is a true printed copy was published in said newspaper on the following days:

November 29, December 6, 13, 20, all in the year 1945.

/s/ M. B. KELLEY.

Subscribed and sworn to before me, this 20th day of December, 1945.

/s/ ALICE A. HILL

Notary Public in and for said County and State.

Certificate of Business Fictitious Firm Name

The Undersigned do hereby certify that they are conducting a manufacturing business, with the principal office for the transaction of the business at 3700 East Olympic Boulevard, Los Angeles, California, under the fictitious firm name of Pioneer Electric Company, and that said firm is composed

of the following persons, whose names in full and places of residence are as follows, to wit:

W. G. Durant, 1245 Wentworth, Pasadena, California;

R. J. Merritt, 111 N. Las Palmas Avenue, Los Angeles, California;

R. J. Merritt, Jr., 111 N. Las Palmas Avenue, Los Angeles, California;

Louis M. Boyle, Ojai, California;

Marion Jenks, 511 N. Muirfield Road, Los Angeles, California;

W. J. O'Keefe, 845 S. Keniston, Los Angeles, California;

L. J. Mitchell, 1117 Story Place, Alhambra, California.

Witness our hands this 23rd day of November, 1945.

PIONEER ELECTRIC
COMPANY,
W. G. Durant
R. J. Merritt
R. J. Merritt, Jr.
Louis M. Boyle
Marion Jenks
W. J. O'Keefe
L. J. Mitchell
By /s/ W. G. DURANT.

State of California,
County of Los Angeles—ss.

On this 23rd day of November, 1945, before me, Cecil W. Collins, Notary Public in and for the said

County and State, residing therein, duly commissioned and sworn, personally appeared W. G. Durant, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CECIL W. COLLINS,
Notary Public in and for said
County and State.

My commission expires September 18, 1946.

Filed November 28, 1945.

J. F. MORONEY,
County Clerk,
By M. E. MORIN,
Deputy.

(33832 Thurs) Nov. 29 Dec. 20

Reprint L. A. Daily Journal—MU. 6354.

[Endorsed]: Filed Dec. 20, 1945.

No. 87750

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original

Certificate of Business Fictitious Firm Name of Pioneer Electric Co. (filed Oct. 15, 1942) and Affidavit of Publication of said Certificate;

Certificate of Business Fictitious Firm Name of Pioneer Electric Co. (filed Jan. 28, 1944) and Affidavit of Publication of said Certificate and

Certificate of Business Fictitious Firm Name of Pioneer Electric Company (filed Nov 28, 1945) and Affidavit of Publication of said Certificate.

on file and/or of record in my office, and that I have carefully compared the same with the originals.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 15th day of February, 1946.

[Seal] J. F. MORONEY,
County Clerk.
By F. R. MILLER,
Deputy.

[Endorsed]: Filed March 20, 1946.

BOARD'S EXHIBIT No. 20

[Letterhead] O'Keefe & Merritt Co.
August 20, 1942.

Pioneer Electric Co.
1221 Los Palos
Los Angeles, Calif.
Gentlemen:

In accordance with our conversation with you relative to subcontracting the electrical work on M5 generator units, we are giving you orders for this work priced at what these cost us from other

sources, without taking the time to break down and analyze costs, and inasmuch as the quantity is larger than the previous order and due to the fact that we are renting you part of our building, thereby eliminating delivery and many other expenses, we feel that there should be considerable saving.

It is therefore understood and agreed that you will in no case charge us more than 10% above your cost, and if there is any saving over this amount, there will be an adjustment in price and any amounts collected in the meantime will be refunded to us.

It is further understood and agreed that should your cost show less than 10% profit or even a loss, there will be no upward adjustment in price.

Very truly yours,

O'KEEFE & MERRITT CO.

DPO:R

Accepted Aug. 20th, 1942.

PIONEER ELECTRIC CO.,
By /s/ W. J. BOYLE.

[Endorsed]: Filed March 21, 1946.

BOARD'S EXHIBIT No. 21

State of California, Office of the Secretary of State

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That I have compared the annexed transcript with the Record on file in my office, of which it

purports to be a copy, and that the same is a full, true and correct copy thereof.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of the State of California this 15th day of March, 1946.

[Seal] /s/ FRANK M. JORDAN,
Secretary of State.
By /s/ CHAS. J. HAGERTY,
Deputy.

ARTICLES OF INCORPORATION OF O'KEEFE & MERRITT COMPANY

Know All Men by These Presents:

That we, the undersigned, a majority of whom are citizens and residents of the State of California, have this day voluntarily associated ourselves together and do hereby so associate ourselves together for the purpose of forming a Corporation under the laws of the State of California, and do hereby declare:

I.

That the name of said Corporation shall be O'Keefe & Merritt Company.

II.

That the purposes for which this Corporation is formed are as follows: To manufacture, buy and sell all kinds of sheet metal products, appliances and implements, and all kinds of patents covering the same, and to erect and own all buildings necessary to contain factories or iron works for carrying on such manufacturing business, and to trans-

act all other such business as is necessary in the prosecution of the sheet metal industry; to own, acquire, lease, hold, sell and convey all kind of real and personal property; to borrow money when necessary for the proper conduct of said business; to buy, sell, acquire, deal in and hypothecate the shares of stock of other incorporated companies; to buy and to own and operate stores for dealing in said sheet metal products, if necessary; and generally to conduct any business of aforesaid as any private individual may do, either in California, or in any other State or Territory in the United States, or in any foreign country.

III.

That the place where the principal business of said corporation is to be transacted is the City of Los Angeles, County of Los Angeles, State of California.

IV.

That the term for which the said corporation is to exist is fifty (50) years from the date of its incorporation.

V.

That the board of directors or trustees of the said corporation shall be five (5) and the names and residences of such Directors or Trustees who are appointed for the first year, and to serve until the First Annual Election, and the qualification of other such officers are as follows, to wit:

D. P. O'Keefe, 625 S. Workman St., Los Angeles, Calif.

R. J. Merritt, 975 S. Vermont Ave., Los Angeles, Calif.

Mrs. Lucille Merritt, 975 S. Vermont Ave., Los Angeles, Calif.

W. J. Boyle, 1657 Orange St., Los Angeles, Calif.

W. J. Boyle, Jr., 1603 Gardner St., Los Angeles, Calif.

VI.

That the amount of the authorized capital stock of said Corporation is one hundrd and fifty thousand dollars ($150,000.00), and the number of shares into which the said capital stock is divided is fifteen hundred shares (1500) of the par value of one hundred dollars ($100.00) each.

VII.

That the amount of the capital stock of this corporation actually subscribed is sixty thousand dollars ($60,000.00), and that the names of the persons by whom the same has been subscribed with the amount of their subscription set opposite their respective names are as follows:

Name of Subscriber	Number of Shares	Amount
D. P. O'Keefe	200	$20000.00
R. J. Merritt	199	19900.00
Mrs. Lucille Merritt	1	100.00
W. J. Boyle, Sr.	199	19900.00
W. J. Boyle, Jr.	1	100.00
Total	600	$60000.00

In Witness Whereof, we have hereunto set our hands this eighteenth day of June, A.D. 1920.

/s/ D. P. O'KEEFE
/s/ R. J. MERRITT
/s/ MRS. LUCILLE MERRITT
/s/ W. J. BOYLE
/s/ W. J. BOYLE, JR.

State of California,
County of Los Angeles—ss.

On this eighteenth day of June, in the year one thousand nine hundred and twenty, before me, Frank W. L. James. a Notary Public in and for said county, residing therein, duly commissioned and sworn, personally appeared W. J. Boyle and W. J. Boyle, Jr., personally known to me to be the persons whose names are subscribed to the within instrument, and they each duly acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of Los Angeles, the day and year in this certificate first above written.

[Seal] /s/ FRANK W. L. JAMES,
Notary Public in and for the County of Los Angeles, State of California.
My Commission expires Oct. 4, 1922.

State of California,
County of Los Angeles—ss.

On this 19th day of June, in the year one thousand nine hundred and twenty, before me, Frank

W. L. James, a Notary Public in and for said county, residing therein, duly commissioned and sworn, personally appeared D. P. O'Keefe, R. J. Merritt, and Mrs. Lucille Merritt, personally known to me to be the persons whose names are subscribed to the within instrument, and they each duly acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of Los Angeles, the day and year in this certificate first above written.

[Seal] /s/ FRANK W. L. JAMES,
Notary Public in and for the County of Los Angeles, State of California.
My Commission expires Oct. 4, 1922.

No. 22813

State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original Articles of Incorporation of O'Keefe & Merritt Company on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 19 day of June, 1920.

[Seal] L. E. LAMPSON,
County Clerk.
By /s/ G. S. CLARKE,
Deputy Clerk.

[Endorsed]: Filed March 21, 1946.

BOARD'S EXHIBIT No. 26
AGREEMENT

This Agreement made and entered into effect the 2nd day of January, 1946, by and between the Pioneer Electric Company, hereinafter referred to as the Company, and the signatory Unions hereto; Stove Mounters International Union of North America, Local 125; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Union No. 389; International Moulders and Foundery Workers, Local 374; District Lodge No. 94 for and in behalf of its affiliate Local 311 International Association of Machinists; Los Angeles County District Council of Carpenters and its affiliate locals; Refrigeration Fitters United Association Local 508 and Painters, Decorators and Paperhangers of America Local 792, hereinafter referred to as the Unions.

Witnesseth:

That Whereas the Company and the Union have a common interest in the furtherance of the business of the Company; and

Whereas a harmonious relationship and economic peace and stability are recognized by the parties hereto as being necessary to improve and maintain proper relations between the Company, the employees thereof, the Union and the public; and

Whereas all of the parties hereto and the public will benefit by continuous economic peace and by the adjustment at the conference table and through the medium of arbitration of any differences between the parties hereto; and

Whereas it is the desire of all parties hereto to further all of the aforementioned ends in entering into this agreement;

Now, Therefore, it is mutually understood and agreed by and between the parties hereto as follows:

Article I

1. The Company hereby recognizes the Union as the exclusive collective bargaining representative with respect to pay, wages, hours of employment and other conditions of employment, for all employees in the classifications listed herein on Exhibit A, which is attached hereto and made a part of this agreement. All employees thus listed shall within 15 days become and remain members of the Union listed in Exhibit A as representing such employees, and shall thereafter remain members of said union in good standing, as a condition of employment.

Article II

In the event any legislation be enacted by the Congress of the United States, as to change in the maximum hours worked per week, the contract shall be open for discussion of the readjustment of wages.

Article III

1. There shall be no stoppage of work because of a strike or lockout by the Union or its members during the life of this agreement. All disputes between any Union and/or its members and the Company to be handled as stated in Article IV, Paragraph 2, of this agreement. The findings and awards of the Arbitrator to be mutually binding.

2. There shall be no lockout on the part of the Company during the life of this Agreement.

Article IV

1a. The Union shall appoint a Shop Committee, and shall notify the Company in writing, promptly upon the signing of this Agreement, the names of the duly elected members of the said Shop Committee. The Union shall also give prompt written notice to the Company for any change in the membership of the Committee.

b. It shall be the duty of the Shop Committee (a) to take up with the Company all matters under the jurisdiction of the Union and covered by this Agreement, and (b) to see that all Union members employed are in good standing in the Union and obey its rules.

c. The Company shall not discriminate against any member of the Union for serving as a member of the Shop Committee, or as an officer of the Union, or for his lawful acts in the fulfillment of the duties hereinabove set forth. Such duties shall, however, be performed as far as the Committee deems possible, with a view not to interfere with normal routine work either of members of the Shop Committee or of other employees of the Company.

2. All grievances which may arise among any of the employees covered by this Agreement shall be handled as follows:

A. When an employee has a grievance, he shall contact his Shop Steward and they shall take it up with his Foreman;

B. When the grievance cannot be thus settled, it shall be taken up by the Shop Committee with the Plant Superintendent;

C. If an adjustment cannot be made between the Shop Committee and the Plant Superintendent, the grievance shall then be taken up by the Shop Committee with the Company, whose representative shall be Cecil W. Collins or his nominee.

D. If the grievance cannot be adjusted, it shall then be taken up with the Company by a Business Representative of the Union.

E. In the event of any dispute between the Company and the Union as to the meaning or interpretation of any provision of this Agreement, or in the event of any alleged grievance, the parties hereto shall exercise every amicable means to settle or adjust such disputes or grievances; but in the event of the failure to accomplish the settlement or adjustment thereof, such disputes or grievances shall be referred to a Board of three Arbitrators and their majority decision shall be binding upon the parties involved. The Board of Arbitration shall consist of one representative to be selected by the Company and one representative to be selected by the Union. The representative so selected shall meet within three (3) days of their appointment and select a third member of the Board, who, when so selected, will act as Chairman. Upon failure of the representatives so selected to agree upon the Chairman within a further three-day period both parties agree that the American Arbitration Association shall be called upon to select a Chairman within ten (10) days. The Board when selected shall meet within a further five-day period at which time both parties will present their cases, and unless

a mutual agreement as to extension of time shall be agreed upon by both parties, it will be mandatory upon the Board to render its findings and decision within five (5) days after conclusion of hearings.

If it shall be determined that any employee or employees have been unjustly laid off or discharged by the Company, they shall be reinstated without discrimination and with pay retroactive to the date of such lay-off or discharge. Either party may elect to use the courts in lieu of arbitration.

Article V.

1. Seniority shall prevail in each classification group. In the event it becomes necessary to reduce the working force in any classification, the last employee hired in said classification shall be the first laid off, and in re-hiring of laid-off employees, it shall be in the reverse, the last man laid off shall be the first to be re-hired, providing the employee is capable of doing the work.

2. Upon application, leaves of absence may be granted to employees without the loss of seniority at the discretion of the Company. If an employee voluntarily leaves the Company's employ, or is discharged, or exceeds the leave of absence granted by the Company; such employee shall lose his or her seniority; likewise, any employee who fails to report back to work within three (3) days after he or she is notified to return to work, shall lose his or her seniority unless such employee proves failure to report was unavoidable.

3. Notwithstanding anything herein set forth, the Company reserves the right to advance any indi-

vidual employee within a department, from one department to another, or to foremanship.

4. The Company will give the Shop Committee, upon request, data taken from the files of the Company specifying the length of service of the employees. This data is intended for use in determining the seniority status of the employees.

5. Employees who have been laid off shall maintain past seniority and shall accumulate additional seniority up to ninety (90) days after such lay-off.

Article VI

1. When necessary for the Company to reduce working hours of any classification, the Company will first lay off employees in that classification of less than three months' seniority, and shall then reduce the schedule of hours in the classification to not less than thirty-five (35) hours per week before laying off other employees. However, to enable the Company to give service to its customers, one man in each classification shall be allowed at all times to work forty (40) hours in any work week, such man to be chosen by the plant Superintendent.

Article VII

a. All employees covered by this agreement shall be entitled to one (1) week vacation with pay after one (1) year of continuous service, to be taken at regular vacation time, and one (1) week's pay at Christmas time. After five (5) years of continuous service, one (1) week vacation with pay, to be taken at regular vacation time, and three (3) weeks' pay at Christmas time. For the purpose of

this Section, one week's pay shall be computed by multiplying straight time hourly rate or pay by the number of hours in the regularly scheduled work week.

b. Vacation schedule shall be made by the Company, provided that whenever choice of time by an employee is practicable, senior employees shall be given first choice.

c. For the purpose of determining eligibility for a vacation with pay, vacation rights shall be terminated if an employee is discharged or quits his employment.

Article VIII

A set of working rules follows, and they shall be a part of this Agreement:

Working Hours

Rule 1: (a) Eight hours shall be a day's work, at any time designated by the Company, between 7:00 o'clock a.m. and 6:00 o'clock p.m. The Company shall have the right to designate different periods of work between such hours for the various departments in the Company and/or for any employee or employees in any such department or departments. This may be changed by mutual consent. Lunch periods shall be thirty (30) minutes and there be no split shifts. Forty (40) hours shall be a week's work. No one to work more than eight (8) hours in any twenty-four (24) hour period for straight or regular time.

(b) The regular twenty-four (24) hour period to be determined by the regular starting time of the shift upon which an employee is employed.

(c) Three shifts in a twenty-four (24) hour period may be established if necessary. The second shift will receive eight (8) hours' pay for seven and one-half (7½) hours' work, with additional bonus of six (6 cents) per hour. The third shift shall receive eight (8) hours' pay for seven (7) hours' work, with additional bonus of six cents (6c) per hour.

Rule 2: (a) The normal work week shall consist of five (5) consecutive eight (8) hour days, Monday through Friday, inclusive, except those employees whose work requires their work week starting on a day other than Monday. In this case the sixth day including the start day shall be considered Saturday and the following day Sunday for pay purposes. Work performed on Saturday shall be paid for at time and one-half. Work performed on Sunday and the following holidays shall be paid at double time: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day. If a holiday falls on a Sunday, the following day shall be considered a holiday.

(b) No work shall be permitted on Labor Day, except for the preservation of life or property.

(c) It is hereby agreed that allowance of an overtime premium on any hour excludes that hour from consideration for overtime payment on any other basis, it being the intention of the parties hereto to thus eliminate any duplicate overtime payments.

Rule 3: Any employee called to work will be allowed four (4) hours' work or four (4) hours'

pay at straight time rates, and if more than four (4) hours is worked, he or she shall be paid for eight (8) hours' work. An employee is deemed called to work unless notified at the expiration of the previous shift not to report for work.

Rule 4: If an employee is temporarily assigned to a job carrying a lower rate pay he shall retain his regular rate. If an employee is temporarily assigned to a job calling for a higher rate of pay, he shall receive the higher rate while so assigned.

Rule 5: No employee shall suffer a reduction in the rate of pay or loss of privileges because of the signing of this Agreement.

Rule 6: Two ten-minute rest periods in any eight (8) hour shift shall be allowed all employees coming under this agreement.

Article IX

1. The wage rates for employees employed in the aforementioned classifications shall during the life of this Agreement be as set forth in Exhibits attached hereto and by this reference made a part of this Agreement as though set out in full at this point.

The employer agrees that all construction, erection, alteration, modification, demolition, addition of improvement in whole or in part of any building, structure or any other facilities in connection with the operation of the plant, to be performed by the employer direct or by contractor or sub-contractor, that the wages and classification of the Southern California Labor Agreement, known as the A.C.C. agreement as predetermined by the De-

partment of Labor under the Davis-Bacon Act shall be paid.

3. Any construction, alteration or repairs which are let out to contract shall be let to a contractor signatory to an agreement with the Los Angeles Building and Construction Trades Council.

Article X

This Contract shall be binding upon the parties hereto, and successors and assigns. It shall not be affected whatsoever by consolidation, merger, sale, transfer, leasing or assignment of either party; or changed in any respect by any change of any kind in the legal status or ownership in the plant, or any part thereof.

Article XI

This Agreement shall remain effect until December 31, 1946, and shall remain in effect from year to year thereafter, unless either party serves written notice on the other party of their desire to amend this Agreement, which notice shall be served on the other party at least ninety (90) days prior to the termination date.

In witness whereof, the parties hereto being duly authorized to execute same, have executed this Agreement as of the day and year first hereinabove set forth.

INTERNATIONAL ASSOCIATION OF
MACHINISTS, DISTRICT LODGE, No. 94,

/s/ STANLEY STEARNS
By /s/ GERALD GORDON

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 389,

By /s/ R. G. LAURENCE

PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, LOCAL 792,

By /s/ C. C. COLLINS

STOVE MOUNTERS INT. UNION OF NORTH AMERICA, LOCAL 125,

By /s/ JOHN D. ROBERTS

INTERNATIONAL MOULDERS AND FOUNDRY WORKERS, LOCAL 374,

By /s/ DREFER,
Secretary
By /s/ WM. A. LAZZARINI

LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS AND ITS AFFILIATE LOCALS,

By /s/ NICK CORDIL

"COMPANY"—
PIONEER ELECTRIC COMPANY,

By /s/ W. D. DURANT,
Partner.

EXHIBIT A

Stove Mounters International Union of N. A
Local #125

Article No. 1

When a new stove is put in, it may be mounted day work by fitter, foreman or mounter until patterns are properly fitted, after which a piece work price at discretion of Company may be set. In case the Union Committee and the Company cannot agree upon the price, a temporary price set by the Company shall be accepted for a period of one month, after which a final price shall be fixed and will be retroactive to the time of setting temporary price. All prices should be set by comparison with similar stoves in the shop. If no similar stoves in the shop, then by comparison with similar stoves in the district.

Article No. 2

All stoves and ranges to be finished complete, in case parts are short, a list of missing parts is to be given the foreman and when furnished before the day's work is finished, are to be mounted on range by Mounters. If day's work is finished before parts are furnished, mounter is to be paid day work for putting these parts on.

This article applies only to old-style mounting individually on the block and bench. Under the new system of mounting on the line, the Company agrees no short parts are to be put on the stove by the Mounter after it leaves the operation where the shortage occurs. Mounters shall not be responsible for enamel chipped or broken through no fault of

their own. The above Rule to apply to all Piece Work.

Article No. 3

So far as reasonably practicable, the Company will transfer employees, who otherwise would be laid off in accordance with seniority lists of their respective departments, to work in other departments.

		Enamel Plant
Brusher (Stenciler)	A.....	$1.00
Brusher (Stenciler)	B.....	.90
Burner	A.....	1.20
Burner	B.....	1.10
Burner	C.....	1.00
Dipper	A.....	1.10
Dipper	B.....	1.05
Dipper	C.....	.95
Handler	A.....	.90
Inspector	A.....	1.15
Inspector	B.....	1.05
Millman	A.....	1.20
Millman	B.....	1.10
Pickler	A.....	1.10
Pickler	B.....	1.00
Sprayer	A.....	1.20
Sprayer	B.....	1.10
Sprayer	C.....	1.00
Wrapper	A.....	.90
General Worker	.....	.90
		Stove Line
Stove Assembler	A.....	1.20—1 year
Stove Assembler	B.....	1.10—6 months
Stove Assembler	C.....	1.00—3 months
Sub-Assembler	A.....	1.05—6 months
Sub-Assembler	B.....	.90—3 months
General Worker	.....	.90
Stock Clerk—		
Parts Handler	A.....	1.05
Parts Handler	B.....	.95

Minimum hiring rate for 30-day qualification shall be 90c.

All Employees after one year to receive the A Rate.

Leadman or Working Foreman—To be paid 10c above the

Sheet Metal Department

Die Setter	A———	$1.25	
Die Setter	B.....	1.15	
Drill Press Opr.	A.....	1.10	
Drill Press Opr.	B.....	1.00	
Layout Press Opr.	A.....	1.35	
Layout Press Opr.	B.....	1.25	
Layout Press Opr.	C.....	1.15	
Power Brake Opr.	A.....	1.15	
Power Brake Opr.	B.....	1.10	
Power Brake Opr.	C.....	1.00	
Power Shear Opr.	A.....	1.20	
Power Shear Opr.	B.....	1.10	
Power Shear Opr.	C.....	1.00	
Punch Press Opr. (Large)	A.....	1.20	(Set own dies)
Punch Press Opr. (Large)	B.....	1.15	(Operator only)
Punch Press Opr. (Large)	C.....	1.05	(Helper)
Punch Press Opr.	A.....	1.15	
Punch Press Opr.	B.....	1.10	
Punch Press Op.	C.....	1.00	
Seam Welder	A.....	1.15	
Spot Welder	A.....	1.15	
Spot Welder	B.....	1.05	
Welder	A.....	1.25	(Combination)
Welder	B.....	1.15	(Arc or Acetylene Only)
Welder	C.....	1.05	

Minimum hiring rate for 30-day qualification shall be 90c.

All Employees after one year to receive the A Rate.

Leadman or Working Foreman—To be paid 10c above the highest rate paid any employee under his direction.

Maintenance Department

Laborer	$ .95
Maintenance Mechanic A	1.35
Maintenance Mechanic B	1.25
Maintenance Mechanic C	1.15
Maintenance Mechanic Helper	95c to 1.05

SCHEDULE "A"

Platers and Polishers

Apprentices	1st	2nd
1st 3 months	.90	.94
2nd 3 months		.98
3rd 3 months		1.02
4th 3 months		1.02
4th 3 months		1.06
5th 3 months		1.10
6th 3 months		1.14
7th 3 months		1.18
8th 3 months		1.22
9th 3 months		1.26
10th 3 months		1.30
11th 3 months		1.34
12th 3 months		1.38
Thereafter		1.40 per hour minimum

Male Helpers—Starting Rate—Minimum 90 Cents Per Hour:

1st 3 months	.90
2nd 3 months	.95
3rd 3 months	1.00
4th 3 months	1.05
5th 3 months	1.10

Feminine—Parts Wrappers:

1st 3 months	.80
2nd 3 months	.85
3rd 3 months	.90
1 Year	1.00

Automatic Polishing Machine Operator to be Classed same as Apprentice or Journeymen Polishers.

Wage Rates

Journeymen Molders	$1.35 per hour
Cupola Tender	1.35 per hour
Sand Blasters or Millmen	1.20 per hour
Grinders	1.15 per hour
Nightmen and Shaker-Outs	1.15 per hour
Cupola Helpers	1.15 per hour
Foundry Helpers	1.10 per hour

Apprentice rates and schedules to be negotiated by the Company and the Union, and to be attached and become a part of the Agreement.

Women employed in the coreroom shall have a hiring rate of .90c per hour for the first thirty (30) days and thereafter shall receive $1.00 per hour.

Machinist Minimum Wage Scales

Tool & Die Makers	A	$1.65
Tool & Die Makers	B	1.50
Tool & Die Makers	C	1.35
Machinists	A	1.50
Machinists	B	1.40
Machinists	C	1.25
Tool Crib Attendant		1.10
Helper		1.00
Construction & Installation		1.75

[Endorsed]: Filed March 22, 1946.

BOARD'S EXHIBIT No. 27
ARTICLES OF COPARTNERSHIP

Articles of Copartnership, made and entered into this 15th day of August, 1942, between Robert J. Merritt, 111 N. Las Palmas Avenue, Los Angeles, California, Willis J. Boyle, 511 N. Muirfield Road, Los Angeles, California and Louis M. Boyle, 155 S. Hudson Avenue, Los Angeles, California:

Witnesseth, that said parties herein, having mutual confidence in each other, do hereby form with each other a partnership agreement on the terms and conditions following, that is to say:

First—The copartnership shall be for the carrying on of the manufacture of slip rings and commutators, and such other items as may be decided by the parties herein; for the fabricating of generator laminations; wiring and winding of part for generators; placing coils in stators and armatures; and such other work as may be decided by the parties herein. To commence on the 15th day of August, 1942, and to continue until terminated by the parties herein.

Second—Said copartnership shall be conducted and carried on under the firm name and style of Pioneer Electric Co., and the place of business shall be at 1221 Los Palos Street, Los Angeles, California, and/or at such other place or places as the partners shall hereafter determine.

Third—The capital of said copartnership shall consist of all the assets of any nature whatsoever and the income and profits arising from the employment thereof, with the exception of what each partner is entitled to draw out as hereinafter mentioned, shall become and constitute a permanent fund for copartnership purposes.

The working capital of the copartnership shall be contributed as follows: Forty per cent (40%) by Robert J. Merritt; Twenty five per cent (25%) by

Willis J. Boyle; and Thirty five per cent (35%) by Louis M. Boyle.

Fourth—Salaries: Robert J. Merritt, Willis J. Boyle and Louis M. Boyle shall be entitled to, and shall receive, a reasonable salary to be fixed by mutual consent and which shall be part of the operating expense of the business.

Fifth—The partners agree to devote their time, skill and energy to the best interest of the business of the copartnership during the continuance thereof.

Sixth—Profits and Losses: The profits arising out of the conduct of the business shall be divided between the partners in the same proportion as their contribution to capital, namely, forty per cent (40%) to Robert J. Merritt, twenty five per cent (25%) to Willis J. Boyle and thirty five per cent (35%) to Louis M. Boyle; and the losses shall be borne in the same proportion.

Seventh—Accounts and Books: Full, just, true and accurate accounts shall be kept of all matters relating to the business to be conducted by the partnership, and the books containing such accounts shall at all times be open to the inspection of all partners. Upon the request of any two partners, arrangements shall be made to have the books and accounts of the firm audited annually by an outside accountant.

Eighth—Inventory: On or near the first of each year, there shall be taken a full and complete inven-

tory of the business and the partners shall render each to the other a just and true account of all matters and things relating to said business at the time of taking of such inventory, and, thereupon the profits and losses, as the case may be, shall be ascertained and divided in the same proportion as their contribution to capital as shown in Article Third. If profits have been made, each partner shall be credited with his share thereof; and if losses have been sustained, each partner shall be charged with his share thereof.

Ninth—Liquidation in Event of Death: In the event of the death of any partner during the continuance of this agreement, then, and in such event, the interest of the partner so dying shall be determined, if such death occurs within three months of the taking of the preceding inventory, as of the date of such preceding inventory and as it then appeared; and, in the event of the death occurring within three months of the next succeeding inventory to be taken as above provided, then the interest of such deceased partner shall be determined from such inventory which shall be taken in the same manner as the inventories were customarily taken by the firm, except that all good outstanding accounts shall be valued at one hundred per cent (100%) of their gross amount and that an adjustment shall be made by an agreement as to the value of doubtful accounts.

Tenth—In the event of the death of any partner within three months of the taking of the next pre-

ceding inventory, his interest, determined as aforesaid from said inventory, shall be paid to his duly authorized legal representatives within thirty days after his death, as follows: One third in cash, one third by promissory note of the surviving partners, payable six months from said date, with interest at five per cent (5%) per annum, and the remaining one third by a further promissory note payable twelve months from said date, with like interest.

Eleventh—In the event of the death of any partner within three months prior to the date of taking the next succeeding inventory as herein provided, the interest of such deceased partner, to be determined by the next succeeding inventory, shall be paid to his duly authorized legal representatives thirty days after the date of the taking of such inventory, one third in cash and the remaining two thirds by two equal promissory notes, payable at the same periods and at the same rate of interest as hereinabove provided in the Tenth Article hereof.

Twelfth—In the event of the death of any partner, his salary shall cease from the date of his death, but his representatives shall be entitled to withdraw an amount equal to his salary from the firm until the settlement with such representatives as above provided, but this amount so drawn, from the date of his death until the date of the settlement, shall be charged against the share or portion in the business of such deceased partner.

In Witness Whereof, the parties to these presents

have hereunto interchangeably set their hands and seals, the day and year first above written.

Signed, sealed and delivered in the presence of:

/s/ ROBERT J. MERRITT

/s/ WILLIS J. BOYLE

/s/ LOUIS M. BOYLE

[Endorsed]: Filed March 22, 1946.

BOARD'S EXHIBIT No. 28
ARTICLES OF COPARTNERSHIP

Articles of Copartnership, made and entered into this 1st day of January, 1944, between Robert J. Merritt, 111 N. Las Palmas Avenue, Los Angeles, California, Robert J. Merritt Jr., 111 N. Las Palmas Avenue, Los Angeles, California, Willis J. Boyle, 511 N. Muirfield Road, Los Angeles, California and Louis M. Boyle, 155 S. Hudson Avenue, Los Angeles, California.

Witnesseth, that said parties herein, having mutual confidence in each other, do hereby form with each other a partnership agreement on the terms and conditions following, that is to say:

First—the copartnership shall be for the purpose of carrying on of the manufacture of slip rings and commutators and such other items as may be decided by the parties herein; for the fabricating of generator laminations; wiring and winding of parts for generators; placing coils in stators and armatures; and such other work as may be decided by the parties herein. To commence on the 1st day of January, 1944, and to continue until terminated by the parties herein.

Second—Said copartnership shall be conducted and carried on under the firm name and style of Pioneer Electric Co., and the place of business shall be at 1221 Los Palos Street, Los Angeles, California, and/or at such other place or places as the partners shall hereafter determine.

Third—The capital of said copartnership shall consist of all the assets of any nature whatsoever and the income and profits arising from the employment thereof, with the exception of what each partner is entitled to draw out as hereinafter mentioned, shall become and constitute a permanent fund for copartnership purposes.

The working capital of the copartnership shall be contributed as follows: Twenty five per cent (25%) by Robert J. Merritt; fifteen per cent (15%) by Robert J. Merritt, Jr., twenty five per cent (25%) by Willis J. Boyle; and Thirty five per cent (35%) by Louis M. Boyle.

Fourth—Salaries: Robert J. Merritt, Robert J. Merritt, Jr., Willis J. Boyle and Louis M. Boyle shall be entitled to, and shall receive a reasonable salary to be fixed by mutual consent and which shall be part of the operating expense of the business.

Fifth—The partners agree to devote their time, skill and energy to the best interest of the business of the copartnership during the continuance thereof.

Sixth—Profits and Losses: The profits arising out of the conduct of the business shall be divided between the partners in the same proportion as their contribution to capital, namely, twenty five

per cent (25%) to Robert J. Merritt, fifteen per cent (15%) to Robert J. Merritt, Jr., twenty five per cent (25%) to Willis J. Boyle and thirty five per cent (35%) to Louis M. Boyle; and the losses shall be borne in the same proportion.

Seventh—Accounts and Books: Full, just, true and accurate accounts shall be kept of all matters relating to the business to be conducted by the partnership, and the books containing such accounts shall at all times be open to the inspection of all partners. Upon the request of any two partners, arrangements shall be made to have the books and accounts of the firm audited annually by an outside accountant.

Eighth—Inventory: On or near the first of each year, there shall be taken a full and complete inventory of the business and the partners shall render each to the other a just and true account of all matters and things relating to said business at the time of taking of such inventory, and, thereupon the profits and losses, as the case may be, shall be ascertained and divided in the same proportion as their contribution to capital as shown in the Third Article. If profits have been made, each partner shall be credited with his share thereof; and if losses have been sustained, each partner shall be charged with his share thereof.

Ninth—Liquidation in Event of Death: In the event of the death of any partner during the continuance of this agreement, then, and in such event, the interest of the partner so dying shall be deter-

mined, if such death occurs within three months of the taking of the preceding inventory, as of the date of such preceding inventory and as it then appeared; and, in the event of the death occurring within three months of the next succeeding inventory to be taken as above provided, then the interest of such deceased partner shall be determined from such inventory which shall be taken in the same manner as the inventories were customarily taken by the firm, except that all good outstanding accounts shall be valued at one hundred per cent (100%) of their gross amount and that an adjustment shall be made by an agreement as to the value of doubtful accounts.

Tenth—In the event of the death of any partner within three months of the taking of the next preceding inventory, his interest, determined as aforesaid from said inventory, shall be paid to his duly authorized legal representatives within thirty days after his death, as follows: One third in cash, one third by promissory note of the surviving partners, payable six months from said date, with interest at five per cent (5%) per annum, and the remaining one third by a further promissory note payable twelve months from said date, with like interest.

Eleventh—In the event of the death of any partner within three months prior to the date of taking the next succeeding inventory as herein provided, the interest of such deceased partner, to be determined by the next succeeding inventory, shall be paid to his duly authorized legal representative thirty days after the date of the taking of such

inventory, one third in cash and the remaining two thirds by two equal promissory notes, payable at the same periods and at the same rate of interest as hereinabove provided in the Tenth Article hereof.

Twelfth—In the event of the death of any partner, his salary shall cease from the date of his death, but his representatives shall be entitled to withdraw an amount equal to his salary from the firm until the settlement with such representatives as above provided, but this amount so drawn, from the date of his death until the date of the settlement, shall be charged against the share or portion in the business of such deceased partner.

In Witness Whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Signed, sealed and delivered in the presence of:

/s/ ROBERT J. MERRITT
/s/ ROBERT J. MERRITT JR.
/s/ WILLIS J. BOYLE
/s/ LOUIS M. BOYLE

[Endorsed]: Filed March 22, 1946.

BOARD'S EXHIBIT No. 29
ARTICLES OF COPARTNERSHIP

Articles of Copartnership, made and entered into this 15th day of November, 1945, between W. G. Durant, 1245 Wentworth, Pasadena, California, R. J. Merritt, 111 N. Las Palmas Avenue, Los Angeles, California, R. J. Merritt, Jr., 111 N. Las Palmas

Avenue, Los Angeles, California, Louis M. Boyle, Ojai, California, Marion Jenks, 511 N. Muirfield Road, Los Angeles, California, W. J. O'Keefe, 845 S. Keniston, Los Angeles, California, and L. J. Mitchell, 1117 Story Place, Alhambra, California.

Witnesseth, that said parties herein, having mutual confidence in each other, do hereby form with each other a partnership agreement on the terms and conditions following, that is to say:

First: The copartnership shall be for the following purposes: To carry on the designing, engineering and manufacturing of generators, motors, transformers, switchboards, various components of commercial radio equipment and such other items as may be decided upon by the parties herein; fabrication of generator and motor parts, wiring and winding of parts for generators and motors, fabrication of skid bases, sheet metal housings, switchboard frames; to maintain with service parts the applicable electrical and mechanical equipment now in the field; and to do such other work as may be decided upon by the parties herein.

To commence on the 15th day of November, 1945, and to continue until terminated by the parties herein.

Second: Said copartnership shall be conducted and carried on under the firm name and style of Pioneer Electric Company and the place of business shall be at 3700 East Olympic Boulevard, Los Angeles, California, and/or at such other place or places as the partners shall hereafter determine.

Third: The capital of said copartnership shall consist of all the assets of any nature whatsoever and the income and profits arising from the employment thereof, with the exception of what each partner is entitled to draw out as hereinafter mentioned, shall become and constitute a permanent fund for copartnership purposes.

The working capital of the copartnership shall be contributed as follows: Twenty five per cent (25%) by W. G. Durant; twelve and one half per cent (12½%) by R. J. Merritt; twelve and one half per cent (12½%) by R. J. Merritt, Jr.; twelve and one half per cent (12½%) by Louis M. Boyle; twelve and one half per cent (12½%) by Marion Jenks; twelve and one half per cent (12½%) by W. J. O'Keefe; and twelve and one half per cent (12½%) by L. J. Mitchell.

Fourth: Salaries: Each of the partners shall be entitled to, and shall receive a reasonable salary to be fixed by mutual consent and which shall be part of the operating expense of the business.

Fifth: The partners agree to devote their time, skill, and energy to the best interest of the business of the copartnership during the continuance thereof.

Sixth: Profits and Losses: The profits arising out of the conduct of the business shall be divided between the partners in the same proportion as their contribution to capital, namely:— twenty five per cent (25%) to W. G. Durant; twelve and one half per cent (12½%) to R. J. Merritt; twelve and one half per cent (12½%) to R. J. Merritt, Jr.;

twelve and one half per cent (12½%) to Louis M. Boyle; twelve and one half per cent (12½%) to Marion Jenks; twelve and one half per cent (12½%) to W. J. O'Keefe; and twelve and one half per cent (12½%) to L. J. Mitchell. The losses shall be borne in the same proportion.

Seventh: Accounts and Books: Full, just, true and accurate accounts shall be kept of all matters relating to the business to be conducted by the partnership, and the books containing such accounts shall at all times be open to the inspection of all partners. Upon the request of any two partners, arrangements shall be made to have the books and accounts of the firm audited annually by an outside accountant.

Eighth: Inventory: On or near the end of each fiscal year, there shall be taken a full and complete inventory of the business and the partners shall render each to the other a just and true account of all matters and things relating to said business at the time of taking of such inventory, and, thereupon the profits and losses, as the case may be, shall be ascertained and divided in the same proportion as their contribution to capital as shown in the Third Article. If profits have been made, each partner shall be credited with his share thereof; and if losses have been sustained, each partner shall be charged with his share thereof.

Ninth: Liquidation in Event of Death: In the event of the death of any partner during the continuance of this agreement, then, in such event, the

interest of the partner so dying shall be determined, if such death occurs within three months of the taking of the preceding inventory, as of the date of such preceding inventory and as it then appeared; and, in the event of the death occurring within three month of the next succeeding inventory to be taken as above provided, then the interest of such deceased partner shall be determined from such inventory which shall be taken in the same manner as the inventories were customarily taken by the firm, except that all good outstanding accounts shall be valued at one hundred per cent (100%) of their gross amount and that an adjustment shall be made by an agreement as to the value of doubtful accounts.

Tenth: In the event of the death of any partner within three months of the taking of the said preceding inventory, his interest, determined as aforesaid from said inventory, shall be paid to his duly authorized legal representatives within thirty days after his death, as follows: One third in cash, one third by promissory note of the surviving partners, payable six months from said date, with interest at five per cent (5%) per annum, and the remaining one third by a further promissory note payable twelve months from said date, with like interest.

Eleventh: In the event of the death of any partner within three months prior to the date of taking the next succeeding inventory as herein provided, the interest of such deceased partner, to be determined by the next succeeding inventory, shall be

paid to his duly authorized legal representative thirty days after the date of the taking of such inventory, one third in cash and the remaining two thirds by two equal promissory notes, payable at the same periods and at the same rate of interest as hereinabove provided in the Tenth Article hereof.

Twelfth: In the event of the death of any partner, his salary shall cease from the date of his death, but his representatives shall be entitled to withdraw an amount equal to his salary from the firm until the settlement with such representatives as above provided, but this amount so drawn, from the date of his death until the date of the settlement, shall be charged against the share or portion in the business of such deceased partner.

In Witness Whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Signed, sealed and delivered in the presence of:

/s/ W. G. DURANT
/s/ R. J. MERRITT
/s/ R. J. MERRITT, JR.
By /s/ R. J. MERRITT
/s/ LOUIS M. BOYLE
/s/ MARION JENKS,
W. J. BOYLE,
Attorney in Fact
/s/ W. J. O'KEEFE
/s/ L. J. MITCHELL

[Endorsed]: Filed March 22, 1946.

BOARD'S EXHIBIT 30

(For identification only)

(A notice was posted on Company Bulletin Board)

RESPONDENT 1

(See Respondent 1—Trial Examiner 1)

RESPONDENT 2

(See Respondent 2—Trial Examiner 2)

RESPONDENT 4

Rejected.

RESPONDENT 5

Rejected.

RESPONDENT 6

Rejected.

RESPONDENT 7

Rejected.

RESPONDENT 8

Rejected.

A.F.L. EXHIBIT No. 1
LOCAL 1981 NEWS

Hearings before the National Labor Relations Board in your case are now in the testimony taking stage. Charles Spallino, your Chief Shop Steward, employee of the Company for 19 years and former President of the Five and Over Club was on the stand for three days last week.

Testimony given depicts a sordid story of double dealing chicanery by the company, its attorneys and Roberts of the Stovemounters. Schemes were hatched and plans made to flout the U. S. Government and deprive the employes of representatives of their choice. The purpose behind all these unfair labor practices had just one purpose: to keep the employes from obtaining wages increases.

It is a deplorable condition that you have to work for an employer who is still operating in the dark ages as far as labor relations are concerned but you can rest assured that when this fight is over you will have the free and unhampered opportunity to enjoy true democratic trade union representation under the banner of the United Steelworkers of America CIO.

A meeting of O'Keefe and Merritt workers will be called in a short time to give you a complete picture of what has transpired at these hearings.

The workers at Republic Supply Company last week showed their ability to pick out a real Union to represent them. At the Government election the USA-CIO polled 20 votes to 11.

Join USA-CIO

Extra

The Electrical Workers Union (AFL) has informed the National Labor Relations Board and you Union that it is not a party to any contract or Agreement with either O'Keefe & Merritt or the Pioneer Elec. Co. and disavows any participation in the unfair labor practises at your plant.

It is to be hoped that other AFL Union will follow the enlightened leadership of the IBEW and give their members an opportunity to secure wage increases and better working conditions under the representation of their certified bargaining agent, the USA-CIO.

USA-CIO Wins Again

The CIO Steelworkers this week won a NLRB election at the SKF Industries by a vote of 1,733 to 572.

At the US Pipe & Foundry in Chattanooga the USA-CIO won by a vote of 250 to 76 for the AFL Moulders. This plant had been under contract with the AFL but evidently the employes decided they had better have a real union and got it.

Bond Crown employes are consolidating their recent election victory by joining Local 1981. These employes know that the way they are going to better their conditions is to join up and make their shop 100%. They are setting an example which the employees at O&M would do well to follow.

Join USA-CIO

Attention Veterans

The laws of your country provide machinery for

the peaceful settlement of labor disputes. The Wagner Labor Act allows workers in any plant to select the Union they wish to represent them by a democratic election supervised by the National Labor Relations Board.

Such an election was held at O'Keefe & Merritt November 21, 1945, with the USA-CIO winning 177 to 114 AFL. The employes chose the CIO in spite of flagrant violations of the Wagner Labor Act by the Company which had made a deal with Mr. Roberts of the AFL Stovemounters Union whereby if the Company could make the employes vote for the AFL, Mr. Roberts would see that his "Union?" would not ask for wage increases except for a few favored stooges. This deal was a failure. However the Company did not give up. Neither did the dues hungry Roberts. The Company changed its name to the Pioneer Electric and signed a closed shop agreement with this phony "union."

At this point your Union took legal action by filing charges with the National Labor Relations Board and the Company is now on trial by the United States Government. As a result of this action the Company is not attempting to enforce the closed shop provisions of the backdoor agreement.

We believe that as the hearing progress some of the AFL Unions will realize the sordid use the company is making of them and withdraw any claim of representation. The IBEW has already refused to be a party to such activities and has so notified the N.L.R.B. and your Union.

Among the charges filed against the company are:

1. Conspiring to violate Government certification.
2. Coercing and intimidating its employes.
3. Preventing the employes from joining the USA-CIO.
4. Attempted bribery of CIO officials.
5. Depriving the employes of their rights under the Wagner Labor Act.

Join USA-CIO and Turn the Page
Join USA-CIO

The history of this case clearly shows that the principles involved are the same as those over which the war was fought and for which you were asked and did risk your lives. It is regrettable that you must now come back to civilian life and work in a plant whose management employs the tactics of a Hitler to deprive its employes of their democratic American right to be represented by the Union of their choice.

The USA-CIO and its members in the plant do not propose to accept this situation. We have a growing membership with the guts and the courage to insist that this is still America. Many of these members are veterans and they call upon every veteran at O'Keefe & Merritt to join them in their fight to preserve democracy at home as they have fought for it abroad.

The 1,000,000 members of the USA-CIO, the greatest labor Union in the country, are solidly behind you in this fight. The 1800 members of your

Local 1981 are making voluntary contributions to finance the battle.

You can help by joining the USA-CIO and supporting your former comrades in arms and carrying on the fight with them.

There is no initiation fee for former service men. You can join by merely paying the $1.50 monthly dues. The sooner all the employes at the plant join the sooner we can secure better wages and working conditions.

Get In and Fight
Join USA-CIO Today
Foundries Settle

After a prolonged battle the foundries under contract with the USA-CIO caved in on March 13th and agreed to pay the 18½c increase and arbitrate the Union shop issue. The companies had made an open and concerted stand against granting a Union shop as demanded at Warman, Alloy and Kinney, but the unshaken solidarity of the USA members forced them to agree to arbitration. The companies used every known device to threaten our members but failed to scare anybody. Just another proof that workers at any plant can secure their just demands by joining the United Steelworkers of America.

Foundry rates in USA-CIO foundries are now the highest by far of any plants in the area and these rates can be secured at O'Keefe & Merritt when the workers realize they have nothing to fear and everything to gain by joining the Union.

Wage negotiations at Joslyn Company have started as their contract had a re-opening clause. This plant went CIO shortly before O&M did but at Joslyn the employes immediately signed up with the CIO after whipping the AFL in the election with the result they have had a contract for five months, have received wage increases as a result of a job evaluation plan and are now negotiating for their 18½c per hour. Could be at O&M too.

Wow! General Motors and General Electric throw in the sponge. 300,000 CIO workers get their 18½c. When General Motors, the most powerful corporation in the world, can't lick the CIO, where does O'Keefe & Merritt think they are going to get off?

By the way, have you seen anything in the papers about an AFL Union getting an 18½c per hour increase for its members?

Neither Have We. Join USA-CIO.
Local 1981
(Fastest growing Local in USA-CIO)

Office 4100 E. Slausen Ave., Maywood, Cal.
Phone LA 5211.
P. O. Box 167, Maywood, Cal.
Perry Nethington, President.
Ray Colville, Representative.
G. J. Conway, International Repr.
Louis Ortega, President O&M Unit.
Chas. Spallino, Chief Stewart O&M.
Plants represented by Local 1981 USA-CIO.
Angelus Sanitary Can Co., A. M. Castle

Company, Bond Crown Company, Auto Sheet Metal Co., Hydromatic Dye Co., Joslyn Co. of Cal., O'Keefe & Merritt, Rheem Mfg. Co., Cal. Cold Rld. Steel, Oil Well Mfg. Co., Pac. Iron & Steel, Naco Mfg. Co.

Regular membership meeting—Fourth Wednesday of month.

Initiation Fee $3.00 (Veterans free).

Dues $1.50 per month.

Eligible to join—Any unorganized worker.

If you have a friend working in an unorganized shop tell him to contact our office and we will undertake to organize it.

Be Wise—Organize—Join USA-CIO

Get Off the Fence

Do you want an 18½c per hour wage increase?

Do you want to get paid for holidays?

Do you want an improved vacation plan?

Do you want seniority rights?

Do you want proper job classification?

Do you want double time for Sunday?

Do you want time and one half for Saturdays?

There is just one way to get these things if you want them and it isn't by sitting on the fence waiting to see what will happen. You can get them by joining the USA-CIO today.

The initiations fee $3.00 (none for veterans).

The monthly dues $1.50.

See the USA-CIO committeeman with the red button who is carrying on your fight and will welcome your help. Show him that you have as much guts and courage as he has.

Join CIO Today

Are you getting these rates at O&M? If you are not you are just robbing yourself because the employes in other USA-CIO shops are now enjoying these wage scales.

Tool & Die Maker	1.785
Machinist	1.485
Tool Grinder	1.485
Turret Lathe	1.405
Assembler	1.395
Helper	1.185
Welders	1.535
Molders	1.535
Pattern maker	1.785
Galvanizer	1.435
Electrician	1.535
Solderer	1.285
Enameler	1.285
Laborer	1.085

The money the Company has already paid to its attorneys to think up schemes to deprive you of your rights would go a long way to paying you wage increases. The employes of O&M can get these wage rates by joining the USA-CIO.

Have you registered to vote? Congressional elections are coming up this year and getting the right people in office is as important as getting an increase. There is a determined attempt to wipe out price control which would mean sky rocketing living costs and only by electing men who will vote for your interests can you keep down your living costs.

Join USA-CIO and Register to Vote Today

[Endorsed]: Filed March 21, 1946.

[Endorsed]: No. 11919. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. O'Keefe and Merritt Manufacturing Company, and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as copartners, doing business as Pioneer Electric Company, Appellees. Transcript of Record. Upon Petition for Enforcement With Modifications of an Order of the National Labor Relations Board.

Filed May 4, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 11919

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

O'KEEFE AND MERRITT MANUFACTURING COMPANY, and L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., and WILBUR G. DUANT, Individually and as Co-Partners, Doing Business as PIONEER ELECTRIC COMPANY,
Respondents.

NOTICE OF MOTION TO INTERVENE

To: Mr. Robert N. Denham, General Counsel, National Labor Relations Board, 815 Connecticut Avenue, N. W., Washington, D. C.

To: Mr. Cecil W. Collins, 2875 Glendale Boulevard, Los Angeles, California.

Please Take Notice that the annexed motion has this day been forwarded to the Clerk's office for submission to the Court.

/s/ ARTHUR J. GOLDBERG,
General Counsel, United Steelworkers of America, CIO.

Dated at Washington, D. C., this 30th day of July, 1948.

[Title of Circuit Court of Appeals and Cause.]

MOTION TO INTERVENE

To: The Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Come the United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, individually and as President of the United Steelworkers of America, CIO, by their counsel, Arthur J. Goldberg and Frank Donner, and respectfully show as follows:

1. On August 26, 1946, the National Labor Relations Board (hereinafter referred to as the Board) issued a Decision and Order under the National Labor Relations Act (49 Stat. 449, 29 U.S.C.A., secs. 151 et seq.; hereinafter referred to as the Act) in a case known upon the records of the Board as "In the Matter of O'Keefe and Merritt Manufacturing Company and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as co-partners, doing business as Pioneer Electric Company and United Steelworkers of America, Stove Division, Local 1981, C.I.O., and Stove Mounters International Union of North America, Local 125, affiliated with American Federation of Labor; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 389, affiliated with American Federation of Labor; International Moulders & Foundry Workers Union of North America, Local No. 374, affiliated with American Federation of

Labor; District Lodge 94, for and on behalf of its affiliate Local 311 of the International Association of Machinists; Brotherhood of Painters, Decorators & Paperhangers of America, Local 792, affiliated with American Federation of Labor; Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, affiliated with American Federation of Labor; and Refrigerator Fitters United Association, Local 508, affiliated with American Federation of Labor, parties to the contract, Case No. 21-C-2689."

2. Said Decision and Order provides as follows:

"Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, O'Keefe and Merritt Manufacturing Company and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as co-partners, doing business as Pioneer Electric Company, Los Angeles, California, and their officers, agents, successors, and assigns, shall:

"1. Cease and desist from:

(a) Urging, persuading, warning, or coercing their employees to join Stove Mounters International Union of North America, Local 125, AFL; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 389, AFL; International Moulders & Foundry Workers Union of North America,

Local No. 374, AFL; District Lodge 94, for and on behalf of its affiliate, Local 311, International Association of Machinists; Brotherhood of Painters, Decorators and Paperhangers of America, Local 792, AFL; and Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL; encouraging membership in any of the above named organizations; and discouraging membership in United Steelworkers of America, Stove Division, Local 1981, CIO, or any other labor organization of their employees;

(b) Recognizing or in any manner dealing with the IAM and the AFL labor organizations named in the preceding paragraph, or any of them, as the exclusive representatives of the respondents' employees for the purposes of collective bargaining in respect to wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization, or any of them, shall have been certified by the National Labor Relations Board as the exclusive representatives of such employees;

(c) Giving effect to the union-shop contract dated January 2, 1946, and signed on January 31, 1946, with the IAM and the AFL labor organizations named in paragraph 1 (a) above, or any modification, extension, supplement, or renewal thereof, or to any superseding or like agreement with them;

(d) Refusing to bargain collectively with United Steelworkers of America, Stove Division, Local 1981, CIO, as the exclusive representative of all production and maintenance employees at the Los Angeles plant of the respondents, excluding office clerical employees, guards, parcel post clerks, draftsmen, timekeepers, material expediters, pattern makers and pattern maker helpers other than those working in sheet metal, experimental laboratory workers, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Stove Mounters International Union of North America, Local 125, AFL; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 389, AFL; District Lodge 94, for and on behalf of its affiliate, Local 311, International Association of Machinists; Brotherhood of Painters, Decorators and Paperhangers of America, Local 792, AFL; and Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL, as

the exclusive representatives of their employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, unless and until the said organizations, or any of them, shall have been certified by the National Labor Relations Board as the representatives of such employees;

(b) Upon request, bargain collectively with United Steelworkers of America, Stove Division, Local 1981, CIO, as the exclusive representative of all production and maintenance employees at the Los Angeles plant of the respondents, excluding office clerical employees, guards, parcel post clerks, draftsmen, timekeepers, material expediters, pattern makers and pattern maker helpers other than those working in sheet metal, experimental laboratory workers, and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(c) Post at their plant at Los Angeles, California, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being

duly signed by the respondents' representative, be posted by the respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondents to insure that said notices are not altered, defaced, or covered by other material;

(d) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this order, what steps the respondents have taken to comply herewith."

3. On August 22, 1947, there became effective certain amendments to the Act.

4. The amended provisions of the Act include Section 9 (f), (g) and (h) thereof (29 U.S.C.A., sec. 159 (f), (g) and (h)). These provisions state:

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its

constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or references to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disburse-

ment of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10

with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

5. The Board has filed in this Court a Petition for Enforcement With Modifications of an Order of

the National Labor Relations Board, dated Washington, May 28, 1948.

6. Said Petition requests the Court to make certain modifications in the Board's order of August 26, 1946.

7. The Petition contains among other requested modifications the following:

> "(6) In order to conform with the policy expressed in Section 9 (f) (g) and (h) of the Act, as amended, of withdrawing the aid of the Act's processes from a labor organization which fails to comply with the provisions of Section 9 (f) (g) and (h), to the extent only that the unfair labor practice involves a refusal to bargain to be remedied by an order to bargain, the Board recommends modification of the foregoing order as follows:
>
> (a) By inserting after the letters 'CIO' in the second line of paragraph 1 (d) thereof the following phrase: if and when said labor organization shall have complied, within thirty (30) days from the date of the decree enforcing this order, with Section 9 (f) (g) and (h) of the Act, as amended,
>
> (b) By inserting after the words 'Upon request' in the first line of paragraph 2 (b) thereof the following phrase: and upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above,
>
> (c) By inserting after the words, 'notice attached hereto,' in the second line of paragraph

2 (c) thereof, the following phrase: modified to include the following phrase to be inserted after the first sentence of the first subparagraph of the notice and to be preceded by a semicolon: 'provided that said labor organization, and any national or international labor organization of which it is an affiliate or constituent unit, shall have complied, within thirty (30) days from the date of the decree enforcing the Board's order, with Section 9 (f) (g) and (h) of the National Labor Relations Act as amended.' "

8. The United Steelworkers of America, CIO, has already complied with Section 9 (f) and (g) of the Act, as amended, and Local 1981 of the United Steelworkers of America will comply with said sections within thirty (30) days from any decree of this Court.

9. Neither the officers of the United Steelworkers of America, CIO, nor the officers of Local 1981, United Steelworkers of America, CIO, have complied with Section 9 (h) of the Act, as amended, nor will said officers comply. Said failure to comply with Section 9 (h) is solely for the reason that said officers believe that the provisions of Section 9 (h) of the Act, as amended, are illegal, unconstitutional and void on the ground that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

10. A modification of the Board's Decision and

Order as requested by said Board will deprive the United Steelworkers of America, Stove Division, Local 1981, C. I. O., its officers and its members of vital constitutional rights.

Statement of Points and Authorities

11. Section 9 (h) of the Act, as amended, is illegal, unconstitutional, void and of no effect. Said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States for the following reasons:

(a) Section 9 (h) of the National Labor Relations Act, as amended, abridges the rights of the Union's officers to freedom of thought, speech, press and assembly in violation of the First Amendment.

(b) Section 9 (h) requires an expurgatory oath, an unconstitutional device used to exact conformity and control thought.

(c) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the members of the Union to elect officers of their own choosing and interferes with the right of freely elected officers of the Union to function on behalf of the membership by imposing a political test on such officers, thus impairing the right of free assembly in violation of the First Amendment.

(d) Section 9 (h) of the National Labor Relations Act, as amended, is vague, indefinite and uncertain and prescribes no ascertainable stand-

ard of conduct so that any officer of the Union who is required to execute the affidavit under said section is afforded no reasonable means to avoid prosecution under Section 35 A of the Criminal Code.

(e) Section 9 (h) of the National Labor Relations Act, as amended, imposes an unreasonable restriction upon the exercise of the rights of free speech and assembly by the officers and members of the Union, in that it compels the loss of valuable rights as a condition to the exercise of the rights of free speech and assembly, in violation of the First Amendment and the due process clause of the Fifth Amendment.

(f) Section 9 (h) of the National Labor Relations Act, as amended, abridges the right of the officers of the Union to engage in political activity, a right reserved to the people by the Ninth and Tenth Amendments.

(g) Section 9 (h) of the National Labor Relations Act, as amended, discriminates among political beliefs and applies only to labor organizations and not to employers. This constitutes a violation of the Fifth Amendment.

(h) Section 9 (h) of the National Labor Relations Act, as amended, constitutes a bill of attainder in violation of Article I, Section 9 (3) of the Constitution of the United States.

(i) Section 9 (h) of the National Labor Relations Act, as amended, deprives the members of the Union of valuable property rights and of

the opportunity to obtain enforcement of said rights in the courts.

Prayer

Wherefore, the United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, individually and as President of the United Steelworkers of America, CIO, respectfully pray that they be permitted to intervene in Case No. 11919 for the purpose of urging that Section 9 (h) of the Act, as amended, is illegal, unconstitutional and void and that the Court enforce the Board's order without any modification requiring compliance with said Section 9 (h).

Respectfully submitted,

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C. I. O.
PHILIP MURRAY,
Individually and as President of the United Steelworkers of America, CIO.
By /s/ ARTHUR J. GOLDBERG,
/s/ FRANK DONNER,
Attorneys, 718 Jackson Place, N. W., Washington 6, D. C.

Filed Aug. 5, 1948. Paul P. O'Brien, Clerk.

At a Stated Term, to wit: The October Term, 1948, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fifth day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present:

Honorable Francis A. Garrecht,
Senior Circuit Judge, Presiding.
Honorable William Healy,
Circuit Judge.
Honorable Homer T. Bone,
Circuit Judge.

[Title of Cause.]

ORDER ALLOWING INTERVENTION

Upon reading the petition of United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, Individually, and as President of the United Steelworkers of America, C.I.O., for leave to intervene herein.

It Is Ordered that said petitioners be, and they hereby are permitted to intervene in the above-entitled cause, and to file briefs herein.

No. 11919

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFE AND MERRITT MANUFACTURING COMPANY AND L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., AND WILBUR G. DURANT, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS PIONEER ELECTRIC COMPANY, RESPONDENTS

AND

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C. I. O., and PHILIP MURRAY, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STEELWORKERS OF AMERICA, C. I. O., INTERVENORS

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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No. 11919

NATIONAL LABOR RELATIONS BOARD, PETITIONER

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ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board (R. I., 195–205),[1]

[1] "R" refers to the printed transcript of record. The roman numerals preceding the comma refer to the volume of the printed record in which the reference appears. The arabic numerals following the comma refer to the pages of the volume of the printed record in which the reference appears.

pursuant to Section 10 (e) of the National Labor Relations Act, as amended, herein called the Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141, *et seq.*), for enforcement with modifications of its order issued against respondents on August 26, 1946, following the usual proceedings under Section 10 of the National Labor Relations Act, herein called the Act (49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*). Respondents are the O'Keefe and Merritt Manufacturing Company, herein called the corporation, and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as co-partners, doing business as Pioneer Electric Company, herein called the partnership, all of whom are herein sometimes collectively called respondents. The labor organizations involved in this proceeding are: United Steelworkers of America, Stove Division, Local 1981, C. I. O., herein called the C. I. O.; Stove Mounters International Union, Local 125, A. F. L., herein called the Stove Mounters; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 389, A. F. L., herein called the Teamsters; International Moulders & Foundry Workers Union of North America, Local No. 374, A. F. L., herein called the Moulders; International Association of Machinists, District Lodge 94, Local 311, herein called the I. A. M.; Brotherhood of Painters, Decorators and Paperhangers of America, Local 792, A. F. L., herein called the Painters; and Los Angeles County District Council of Carpenters, United

Brotherhood of Carpenters and Joiners of America, A. F. L., herein called the Carpenters. With the exception of the first enumerated labor organization, which is a C. I. O. affiliate, the remaining labor organizations are herein collectively called the A. F. L.[2] The jurisdiction of this Court is based upon Section 10 (e) of the Act, as amended, the unfair labor practices having occurred at respondents' plant in Los Angeles, California.[3] On August 5, 1948, pursuant to their motion to intervene "for the purpose of urging that Section 9 (h) of the Act, as amended, is illegal, unconstitutional and void" (R. IV, 1777, 1764–1777), this Court entered an order permitting the intervention in this proceeding of United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, individually and as president of the United Steelworkers of America, C. I. O. (R. IV, 1778). The Board's decision and order (R. I, 174–190, 61–119) are reported in 70 N. L. R. B. 771.

STATEMENT OF THE CASE

I. The Board's findings of fact

The course of the unfair labor practices in this case, initiated by the corporation and ultimately joined in

[2] Although the I. A. M., included in this group, is not presently an affiliate of the American Federation of Labor, in the interest of convenience, and for reasons which appear *infra*, p. 65, n. 38, reference to the A. F. L. includes the I. A. M.

[3] In the conduct of their business, more particularly described *infra*, pp. 4–6, 21–26, respondents make substantial sales in interstate commerce (R. I., 69–72; R. III, 1056, 1268). Jurisdiction is not contested (*ibid.*, R. I., 321).

by the partnership, was designed to prevent their employees from selecting and bargaining through the C. I. O. as their exclusive representative and, against the employees' will, to establish the A. F. L. as their bargaining representative. The specific shape which these unfair labor practices took may best be understood in relation to certain antecedent events.

A. The background

1. The business of the corporation and the partnership

Chartered in 1920 as a California corporation (R. I, 70; R. IV, 1717–1722),[4] the corporation was thereafter continuously engaged at its plant in Los Angeles, California, in the business of manufacturing and selling gas stoves, other gas appliances, and electric refrigerators until December 7, 1941 (R. I, 70; R. III, 1055–1056, 1351). Thereafter, with the advent of the war, it was exclusively engaged as a prime contractor in the manufacture of electrical generator sets and ammunition for the military services of the United States Government (R. I, 70; R. III, 1056, 1060, 1351–1353).

In 1942, at the suggestion of W. G. Durant, the corporation's chief engineer, to Daniel P. O'Keefe, the corporation's president, in order to eliminate extensive subcontracting and to effect economies in operation, it was decided to set up a partnership to handle certain electrical wiring incident to the manufacture of the generators for the military services (R. I, 71; R. III, 1140, 1197–1198, R. IV, 1447–1449).

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[4] Where, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings, succeeding references are to the supporting evidence.

On August 15, 1942, the partnership was formed, composed of three individuals, two of whom were officers and directors in the corporation and all of whom were stockholders in the corporation (R. I, 71, 72, n. 7; R. IV, 1703–1706, 1738–1743).[5] On November 16, 1942, the corporation leased to the partnership part of its premises, about twelve thousand square feet of enclosed floor space, for a term of one year, at a monthly rental of five hundred dollars, in which the partnership conducted its operations (R. I, 71; R. III, 1064–1065). After the expiration of the term of the lease, the partnership continued in occupancy on the same conditions (R. III, 1215).

About August 14, 1945, V-J day, the Government terminated 70 percent of its outstanding contracts with the corporation, and within a month practically all of the remaining contracts were terminated (R. IV, 1453). The partnership's activities were correspondingly sharply curtailed, and within two months, its production and maintenance force, which on V-J day amounted to one hundred eighty employees, rapidly dwindled to fifteen employees (R. I, 71; R. IV, 1453–1454, R. III, 1144–1146). The corporation, with its approximately 350 production and mainte-

[5] The membership of the partnership consisted of Robert J. Merritt who was secretary-treasurer and director of the corporation, and owned 12.5 percent of its shares (R. I. 70–71; R. III, 1048–1049, 1124); Willis J. Boyle who was vice-president and director and owned 8.1 percent of its shares (*ibid.*); and Lewis M. Boyle who owned 8.3 percent of the corporation's shares (R. I, 71; R. III, 1125). On January 1, 1944, Robert J. Merritt, Jr., son of Robert J. Merritt (R. III, 1126), was admitted to membership in the partnership (R. I, 71; R. III, 1707–1710). He owned 4 percent of the corporation's shares (R. I, 71; R. III, 1124).

nance employees, undertook reconversion to peacetime production (R. I, 180; R. III, 1353–1356; R. II, 668).

2. The A. F. L.'s drive to organize the corporation's employees in 1936

In 1936 or 1937, the American Federation of Labor conducted an unsuccessful campaign to organize the corporation's employees (R. I, 73–74; R. II, 645–646; R. IV, 1491, 1515–1517). As part of that campaign, in conjunction with a strike and picketing in 1936, the American Federation of Labor posted the corporation on its unfair list, and has thereafter apparently continued to list the corporation as unfair (R. I. 73–74; R. II, 665–667; R. IV, 1516–1517).

3. The Five and Over Club

The Five and Over Club, organized in 1935 by the president of the corporation, functions primarily as an employee's social and benefit organization (R. I, 77, n. 12; 360, R. IV, 1524–1525). Membership in it is open to all of the corporation's personnel who have five years' service or more (R. I, 77, n. 12; 360, R. IV, 1524). During the 1936 strike, it formed an employee grievance committee, and since then it has been used sporadically, at the suggestion of the president of the corporation, as a means of settling employee grievances (R. I, 77 n. 12; 366, 368, 370, R. II, 649–650, 590–591, R. IV, 1513–1514). Charles Spallino, elected president of the club in January 1945, and previously thereto having served as president for two years and vice president for four years (R. I, 77; R. II, 540–541), described the policy of the Five and Over Club as antiunion (R. III, 1260).

B. The events preceding the consent election

In September 1945, the C. I. O. began an organizational campaign among the corporation's approximately three hundred fifty production and maintenance employees (R. I, 74–75; R. II, 746–747, R. III, 1226). The A. F. L. undertook a rival campaign, and, in order to resolve the disputed question concerning representation thus raised, a consent election agreement was entered into providing for the conduct of an election, to be held on November 20, 1945, to determine whether the corporation's production and maintenance employees desired to be represented by the C. I. O., the A. F. L., or neither (*Infra,* pp. 63–65). The period preceding the consent election was marked by a pervasive effort upon the part of the corporation to assist the A. F. L. in the conduct of its campaign and to secure the defeat of the C. I. O.

1. The corporation enlists two employees to campaign for the A. F. L.

About October 1, 1945, shortly after the inception of the C. I. O.'s organizational campaign, Charles Spallino, the then president of the Five and Over Club, and John Lovasco, another corporation employee, were in the office of Daniel O'Keefe, president of the corporation (R. I, 77–78; 423, R. IV, 1535). In answer to the inquiry by Spallino and Lovasco concerning the position that the Five and Over Club should take in regard to the organizational campaigns of the A. F. L. and the C. I. O., O'Keefe replied that he would prefer not to deal with either union, but that if he had to make a choice, he would favor the

A. F. L. in order that the corporation be stricken from the A. F. L. unfair list, thus removing an obstacle to enlarging the corporation's market for its goods (R. I, 78; 424, R. II, 731, R. IV, 1535–1546). Although disclaiming an intention to dictate the policy of the Five and Over Club, O'Keefe suggested that they speak to Cecil Collins, the corporation's attorney and labor relations advisor, concerning the matter (R. I, 78–79; 424, R. III, 1162–1165, 1167–1168, R. IV, 1566–1567).

Several days later, in accordance with O'Keefe's suggestion, Spallino and Lovasco met with Collins during working hours in Collins' office in the plant (R. I, 79; 371–372). Collins was asked by them "what he knew about the shop going union," and in reply he stated, "We are going to have to go union. Naturally, A. F. L. is what we want. The C. I. O. is a radical organization and we couldn't do business with them" (R. I, 79; 375–376). Collins explained that he had already been in touch with a Mr. Roberts of the A. F. L., and that the procurement of an A. F. L. charter had been arranged (R. I, 376). Affiliation with the A. F. L. would succeed, Collins continued, in removing the corporation from the A. F. L. unfair list, and aid in marketing the corporation's products (R. I, 79; 377, R. II, 734–735). Collins stated that Roberts would shortly meet with Spallino and Lovasco (R. I, 79; 376, 377, 379). Meanwhile, he concluded, Spallino and Lovasco were to go into the plant and sign up 50 members for the A. F. L.: "You get 25 Five and Over members, that is, the latest

members, the new ones. And 25 nonmembers from the plant. Pick the weak ones you can lead * * *" R. I, 378, R. II, 734).

Two or three days later, in accordance with the stated arrangement, Spallino and Lovasco met John Roberts of the Stove Mounters, A. F. L., in the "front office" of the plant (R. I, 380). After telling Roberts that a few employees had already been "signed up" for the A. F. L., the three left the plant and went to Roberts' car where Spallino and Lovasco were given about one hundred Stove Mounters' membership application blanks (R. I, 79; 381–382). They were instructed by Roberts to obtain at least fifty signatures within three or four days in order to set in motion the procedure for obtaining an A. F. L. charter (R. I, 384).

Spallino and Lovasco immediately embarked on their proselytizing duties (R. I, 79; 386–387). Spallino explained his method as follows: "Well, I approached a man and asked him, told him that we had to join the union, and we had to join the A. F. of L., that is the Company wanted the A. F. of L., but at election time they could vote the way they wanted. That is the way I brought it up to them, and they signed—well, I signed about thirty-eight, about thirty-eight or forty, before we met Mr. Roberts again" (R. I, 79; 386). Within a week, Spallino and Lovasco, summoned to the entrance to the plant by a guard, again met Roberts and reported to him the progress in their assignment (R. I, 389–391). Two

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or three days later, Spallino and Lovasco delivered about forty executed membership cards to Roberts in the plant (R. I, 79; 391–397).

Several weeks later, in the latter part of October 1945, Spallino and Lovasco were called to Collins' office where they met representatives of the Stove Mounters, I. A. M., Teamsters, and Carpenters (R. I, 79–80; 440–442). In Collins' presence, the union representatives questioned Spallino concerning the union preferences of the employees in the various departments (R. I, 80; 449–450). Spallino reported that employee sentiment was strongly C. I. O., and advised them to hold an A. F. L. meeting at which the A. F. L. position could be outlined (R. I, 80; 450–451). In response to Spallino's suggestion that he knew of a likely meeting place, Roberts of the Stove Mounters, authorized him to make arrangements to rent the hall (R. I, 80; 451). Within two or three days, as planned, Spallino rented the hall, but despite the distribution of an A. F. L. handbill inviting the employees to the meeting, only thirty employees appeared (R. I, 80; 452, R. II, 485–487). A second meeting was held about a week later (R. I, 80; R. II, 487).

Shortly thereafter, during the first part of November 1945, a meeting was held in Collins' office, attended by Collins, the personnel manager, the plant superintendent, and Charles Spallino and Lovasco (R. II, 488–489). Spallino complained that he "was doing a little too much running around at this campaign for the A. F. of L.," and he thought he "was not really getting anything for all that extra work"

(R. II, 489). He devoted two to three hours per day for one month during working hours in his company-inspired A. F. L. campaigning which carried him to the various plant departments and for which he received his customary salary (R. I, 387, 388, R. II, 541, 543). Collins replied, "If you want to better yourself, you are working with * * * [the plant superintendent] there, he could easily give you a nickel or a ten-cent raise" (R. II, 490). At this time, Collins received a telephone call from John Despol, the C. I. O. representative, who protested the A. F. L. proselytizing which the corporation was countenancing on its time and property (R. II, 752, 490–491). Professing ignorance of the activities which he himself fostered, Collins promised to investigate and to discipline any infractions of the corporation's neutrality (R. II, 490–493, 752–753).

2. The pro-A. F. L. speech delivered by the corporation's president on the day of election

A day or two before the November 20 election, Spallino and Lovasco met with President O'Keefe in his office and submitted to him for approval a pro-A. F. L. document, evidently inspired by Collins, which was to be either reproduced and distributed as a Five and Over Club handbill or to be used as the basis of a speech before the members of the Five and Over Club (R. I, 80–81; R. II, 495–502, 559–564, R. III, 1161–1162). O'Keefe, after considering the contents and suggesting some changes, recommended that the document be abandoned because it would sound too much like a speech emanating from him,

and stated that he would himself deliver a speech to the employees before the election (R. I, 81; R. II, 501, R. III, 1162).

On November 20, 1945, shortly after the corporation's employees returned from lunch, O'Keefe caused all of them to be assembled in the plant and addressed them concerning the election to be held at 4:30 on that afternoon (R. I, 81; R. III, 1208–1209, 1084–1095).[6] O'Keefe disclaimed an intention of "butting in," but asserted that "some of the old timers around here asked me to express my views" (R. III, 1087). He still thought "all unions are bad * * * a lot of them want to make a living without doing any work themselves" (R. I, 81; R. III, 1087). He then said, "But that is not the issue now. The question for you to decide is which of the two, let's say evils, is the lesser. * * *" (R. I, 81; R. III, 1087). He aspersed the sincerity of the C. I. O.'s promises, and questioned their ability to fulfill them (R. III, 1087–1091). He contrasted his version of the C. I. O.'s campaign with what he characterized as the moderateness of the A. F. L.'s representations, stating that "I understand the A. F. of L. had several meetings which were attended by some of you and I have been informed that they promised

[6] Although it was stipulated that the speech was delivered "approximately the 19th of November" (R. II, 504, 507), it is clear that it was actually made on the date of the election. It is not disputed that it preceded by a few hours a speech made by John Lovasco which unquestionably was delivered on the day of the election (R. II, 507–511, R. III, 1028–1029, cf. 1204–1205). The Trial Examiner's finding to that effect, repeated verbatim above, was not excepted to, and is therefore concededly correct.

to get you the going rate in this industry for whatever job you were doing and while this probably did not sound as inticing (sic) as the big promises made by C. I. O., nevertheless it shows that they were honest and playing the game fair with you" (R. III, 1091). He emphasized that the corporation's continued well-being depended on the expansion of its market, which in turn depended on the acceptability of its products to the A. F. L. because most of the installation of domestic appliances in the building trades was performed by A. F. L. workmen (R. I, 81; R. III, 1092). He stressed that because the work of the employees was "closely identified with the building trades" which was predominantly A. F. L., it would be necessary for them if they were to look for work in other plants to be members of the A. F. L. (R. I, 81; R. III, 1092–1093). After making this strong plea for the A. F. L., he concluded by saying "there are three places to vote—one for the C. I. O., one for the A. F. of L., and one for neither. I can just imagine that there are a number of you who would be very glad to vote for neither, but I want to ask you as a favor to pass this up and vote for one or the other" (R. I, 81; R. III, 1094).

3. The pro-A. F. L. speech delivered on company time and property to the members of the Five and Over Club fifteen minutes before the election

At 4:15 p. m., just prior to the election which began at 4:30 p. m., Spallino called a meeting of the Five and Over Club in the plant (R. I, 81–82; R. II, 507–510). The foremen of the various plant departments announced the time and place of the meeting,

and about two hundred members of the Club attended and were evidently paid for the fifteen minutes' time spent there (R. I, 82, n. 17; R. II, 509–510, 511; R. III, 1028–1029). Lovasco, introduced by Spallino, delivered a pro-A. F. L. speech which, like that of O'Keefe's, emphasized that it would be to the employees' advantage to vote for the A. F. L. inasmuch as most stove factories were under A. F. L. contract (R. I, 82; R. II, 510–511; R. IV, 1569). Immediately thereafter the employees went to the polls (R. I, 82; R. II, 511).

C. The victory of the C. I. O. at the polls

At the election, of the 341 employees eligible to vote, 177 voted for the C. I. O., 114 voted for the A. F. L., five voted for neither, and two cast void ballots (*Infra,* p. 67). In due course, the Board's Regional Director issued a Consent Determination of Representatives, herein called the certification, in which he found and determined that the C. I. O. was the exclusive bargaining representative of the production and maintenance employees (*Infra,* p. 68).

D. The November 27 pro-A. F. L. speech by the corporation's president

On November 27, a week after the election, O'Keefe delivered a second pro-A. F. L. speech to the corporation's employees in the plant during working hours (R. I, 84, R. II, 502–505, R. III, 1095–1105). O'Keefe began by promising the piece-time workers that they would be paid for the time spent listening to his speech (R. III, 1095). He expressed his regret that the C. I. O. won the election, and stated that

the C. I. O. would be unable to negotiate a contract which would bring the employees any greater benefits than the A. F. L. would have been capable of obtaining (R. I, 84; R. III, 1096–1097). He adverted to his previous speech, and repeated his warning of the drastic loss of business which the selection of the C. I. O. assertedly entailed (R. III, 1097–1099). The corporation's products "might just as well be marked "Made in Japan" as not to have the A. F. of L. label on them, which means that *unless we made other arrangements for manufacturing these,* we are not going to do much in the water-heater business" (R. I, 84; R. III, 1098–1099). [Emphasis supplied.] The corporation's chief engineer (subsequently to become the partnership's general manager) refused to accept his new assignment because "he figures that selling water heaters made by C. I. O. men to A. F. of L. builders is a lot harder than selling refrigerators to the eskimos" (R. III, 1099). But, he was "reconciled to all this" until he had spoken to several friends and prospective customers who expressed their regret that they would be unable to award him some lucrative contracts in view of the C. I. O. affiliation of his employees (R. III, 1099–1100). It was humiliating, O'Keefe said, to have these people say, "You must have the dumbest clucks in the world working for you when they are in the Building Trades Industry and vote C. I. O." (R. III, 1100). He then advised his employees, "You know after all, there is only a little difference between success and failure—that little difference comes in exercising good judgment" (R. III, 1100).

He again emphasized that the contemplated expansion of the business could not be undertaken *"unless we make some kind of arrangement for the manufacture of our ranges that will be satisfactory to the A. F. of L."* (R. III, 1101). "The future looked brighter than it ever did since we have been in business, when all of a sudden, I presume spurred on by big promises and maybe a desire to do us some harm, a majority of you, through bad judgment, poor information or some other reason, have thrown a curtain that makes things darker than they have ever been" (R. III, 1101–1102). He mentioned by name four C. I. O. adherents among the employees concerning whom he found it difficult to believe, in view of the corporation's past favors to them, that they had intentionally "wished to work a hardship on the rest" (R. III, 1102–1103). He concluded by saying, "Now, I realize that the election is over—you have voted C. I. O. Even if you changed your minds tomorrow, we could not have another election for at least six months and maybe a year. *Therefore, if we wish to do business with the builders and in San Francisco territory, we have two alternatives—to contract enough of our labor to a firm with an A. F. of L. contract, in order that they would take us off the unfair sheet—or to take advantage of the possibilities to sell this business to some one who has an A. F. of L. organization"* (R. I, 84; R. III, 1104). [Emphasis supplied.] As a parting thrust, he stated

that two officers of the corporation, one of whom had previously dealt with the C. I. O., were so discouraged with the prospects that they want "to sell out" (R. I, 84; R. III, 1104).

E. The inconclusive bargaining negotiations between the C. I. O. and the corporation

Following the certification of the C. I. O. as the exclusive bargaining representative, five bargaining conferences were held between the corporation and the C. I. O. on December 15 and 25, 1945, and on January 3, 8, and 25, 1946, in Collins' office at the plant (R. I, 89–93; R. II, 768–769, 771, 773, 775, 787, 791–792). The principal negotiators were Cecil Collins, on behalf of the corporation, and John Despol, on behalf of the C. I. O. During the course of the negotiations, the familiar subjects of collective bargaining contracts were discussed (R. I, 89–93; R. II, 768–794). The negotiations, which failed to culminate in agreement, were marked by events which revealed, as the Board found (R. I, 98–101), that the corporation participated in them without a sincere purpose of composing differences.

At the first meeting on December 15, Despol submitted a proposed contract to Collins, and further discussions were postponed in order to afford Collins the opportunity of studying the document (R. I, 89; R. II, 768–771, R. IV, 1665–1693). At the second meeting, after indicating his position on certain wage and union security provisions, Collins asserted "that he had not had time to thoroughly go over the bal-

ance of [the] contract" (R. II, 772). At the third meeting, Collins declined to discuss the hours of work provision of the proposed contract because "he wanted to read that more thoroughly, he was not ready to decide on the exact language" (R. II, 776). At the fourth meeting, Collins stated "that he had not found the time to read carefully all the language of [the] contract, and that he was still not sure of some of the language." (R. II, 789). In order to prevent further evasiveness, Despol requested and Collins agreed to submit within a week written counterproposals to each provision of the proposed contract (R. I, 92; R. II, 789, 791). At the last meeting, no counterproposals having been received in the interim, Despol repeated his request, but neither then nor thereafter has Collins fulfilled his promise to submit counterproposals (R. I, 92; R. II, 793–794, 791).

At the third bargaining conference on January 3, Collins invited a committee of A. F. L. adherents among the employees to attend the meeting ostensibly for the purpose of protecting the A. F. L. interests in the plant (R. I, 90; R. II, 773–775, 853–855, R. IV, 1395, 1544, 1556–1557). In the presence of these employees, Collins announced to Despol that their negotiations would probably prove a waste of time, because the corporation was planning to transfer its manufacturing facilities to the partnership. As a result of attendant decrease in the corporation's production and maintenance force, the C. I. O. would then be left with

very few employees to represent (R. I, 90; R. III, 1286–1288, R. IV, 1544, 1557–1558, 1378). Despol protested that the C. I. O. did not intend to lightly surrender the time, money, and effort expended in organizing the plant, and that, if necessary, the employees would strike in order to secure a satisfactory agreement (R. I, 91–92; R. III, 1288–1289; R. IV, 1545–1548, 1558–1559, 1378–1381). Collins stated that if the anticipated transfer were completed, he would seek to have the corporation reimburse the C. I. O. for its organizational expense on condition that the C. I. O. refrain from striking and litigate any controversy between the corporation and the C. I. O. before the Board and the courts (R. I, 91; R. III, 1288–1291, 1380, 1549, 1559–1560).

At the fourth bargaining conference, on January 8, Collins invited another committee of A. F. L. adherents to attend the meeting (R. I, 91; R. II, 787–788, R. IV, 1557, R. III, 1302–1303). Despol objected to the presence of any committee purporting to represent the A. F. L. (R. I, 91–92; R. II, 788). He accepted their presence at this meeting because the discussion would be limited to procedural aspects of the contract, but he insisted that since the ensuing negotiations would relate to "wage and cost factors of the contract" he would not in the future consent to bargain in the presence of any such committee (R. I, 92; R. II, 788; R. III, 1303). During the meeting,

Collins reiterated his prediction that an impending deal between the corporation and the partnership would render the negotiations futile (R. III, 1303–1304).

Throughout the negotiations, Despol sought to persuade Collins to consent to a "union shop" contract, but the latter was willing to consider only maintenance of membership and check-off provisions (R. I. 89–90; R. II, 772, 776, 851; R. III, 1303; R. IV, 1558). Nevertheless, three days after the last meeting with the C. I. O. on January 28, Collins on behalf of the partnership, entered into a closed-shop agreement with the A. F. L. covering the same group of employees for whom the C. I. O. was negotiating (*infra,* p. 28).

F. The execution of the plan to evade bargaining with the C. I. O.

At the same time that the corporation was ostensibly bargaining with the C. I. O. in order to arrive at a mutually satisfactory agreement, the corporation was negotiating a transfer of its manufacturing facilities to the partnership, with attendant transfer to the partnership of most of its production and maintenance employees, for the purpose of setting at naught the certification of the C. I. O. as the employee's exclusive bargaining representative; and the partnership, through Collins, was negotiating a closed-shop agreement with the A. F. L. to be presented as a *fait accompli* to the production and maintenance employees who had chosen the C. I. O. to represent them.

1. The relationship between the corporation and the partnership

On November 15, 1945, an instrument entitled "Articles of Copartnership" was executed which resulted in the alteration of the membership of the partnership as it then existed (*supra,* pp. 4–5) through the withdrawal of one partner and the admittance of four new partners (R. I, 72; R. IV, 1747–1752, 1711–1715). The resultant interlocking relationship between the partnership and the corporation, measured in terms of common financial holdings, family kinship, and positions of authority in the respective business entities, is illustrated in the following table:

Name (those *italicized* are members of the partnership)	Family relationship	Position in corporation	Holdings in corporation (percent) (R. I, 71; R. III, 1124)	Holdings in partnership (percent) (R. I. 72; R. IV, 1749–1750)	
			Percent	*Percent*	
D. P. O'Keefe		Director, president	23.7		(R. I, 70; R. III, 1049, 1051).
Wm. J. O'Keefe	Son	Director, plant superintendent until shortly before reorganization of partnership.	4.8	12.5	(R. I, 70–71; R. III, 1049, 1076, 1150, R. IV, 1528).
L. J. Mitchell	Son-in-law	Auditor		12.5	(R. I, 72, n. 7; R. III, 1126, 1075, 1133, 1205).
Phyllis J. Mitchell	Daughter (wife of L. J. Mitchell).		4.8		(R. I, 72, n. 7; R. III, 1126).
			33.3	25.0	
R. J. Merritt		Director, secretary-treasurer	12.5	12.5	(R. I, 70–71; R. III, 1048–1049).
Lucille Merritt	Wife	Director	16.8		(R. I, 70–71; R. III, 1049, 1121).
R. J. Merritt, Jr	Son		4.0	12.5	(R. I, 71; R. III, 1126).
			33.3	25.0	
Willis J. Boyle		Director, vice president	8.1		(R. I, 70; R. III 1048–1049).
Blanche M. Boyle	Wife		8.3		(R. III, 1203).
Marion Jenks	Daughter		.1	12.5	(R. III, 1126).
John E. Boyle	Son		.1		(R. III, 1203–1204).
			16.6	12.5	
Lewis M. Boyle	Brother		8.3	12.5	(R. III, 1067).
Evelyn B. Boyle	Wife or Daughter		8.3		(R. III, 1203).
			16.6	12.5	

W. J. and L. M. Boyle, trustees	Brothers		.1 33.3	 25.0	(R. III, 1067).
Arlene B. Oliphant			.1		
W. G. Durant		Chief Engineer earning in excess of $100,000 per year. Upon reorganization of partnership, he became the managing partner.		25.0	(R. I, 72; R. III, 1073, 1140-1141, R. IV, 1420-1422).

the premises in repair," to "furnish all utilities," and to "pay all taxes and insurance on the premises and equipment" (R. I, 95; R. III, 1114).

The partnership agreed "to manufacture any and all products required of it" by the corporation in accordance with the specifications and standards of care prescribed by the corporation, and the partnership further agreed not to manufacture any products other than corporation products without first obtaining "the written consent" of the corporation. The corporation is required to "furnish all material and equipment * * * necessary to perform said service." In compensation for its services, the partnership is to receive "the cost of labor plus two and one-half percent" (R. I, 95; R. III, 1113–1114).

The partnership agreed to hire all the employees currently working for the corporation without any loss in wages, seniority, or other benefits. In order to maintain the existing employee benefits, the corporation agreed to compensate the partnership for expenses incurred in maintaining a pension fund, insurance plan, Christmas bonuses, and contributions to the Five and Over Club (R. I, 95; R. III, 1112, 1114). The agreement, inclusive in all these respects, was significantly free of any mention of the obligation to bargain with the C. I. O., although the partnership knew, through its managing partner, even assuming the fiction of separate business entities, that the C. I. O. was the certified representative of the employees (R. I, 103; R. IV, 1447).

3. The reason for the transfer of manufacturing facilities and execution of the closed-shop agreement

A major consideration for the transfer of manufacturing facilities was the desire to avoid the obligation of bargaining with the C. I. O. (R. I, 93–94; R. III, 1141–1142, 1144). Thus, President O'Keefe quite candidly testified as follows (R. III, 1144):

> Well, we were on the unfair list with the A. F. L. and all our business came, or not all of it but a lot of it was done with the Building Trades, and I figured that we could lease to someone who would work under a contract, that would be satisfactory to the A. F. of L., we would probably be getting off the unfair list.

And he earlier testified that in order to avoid "many labor arguments around there of different kinds" between the A. F. L. and the C. I. O., he "figured the easy way would be to lease the buildings to Pioneer Electric [partnership] and let them do the worrying about it" (R. III, 1141–1142).[7a]

4. The partnership enters into a closed-shop agreement with the A. F. L.

Sometime between President O'Keefe's second pro-A. F. L. speech on November 27, 1945, and a third announcement by O'Keefe to the employees on February 1, 1946, Collins delivered a pro-A. F. L. speech to the employees in the plant during working hours (R. I,

[7a] Another consideration was OPA and tax advantages, but, as the Board noted, respondents "failed to separate" the legal reason from the illegal reason, and hence failed to relieve themselves of the responsibilities for the illegal one (R. I, 180; R. III, 1027–1028; R. IV, 1428–1429, citing *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. C. A. 2), cert. denied, 304 U. S. 576). See, *infra*, pp. 85–86.

101; R. III, 1115–1117; R. II, 569; R. III, 1109–1110). He adverted to O'Keefe's earlier pro-A. F. L. speech, and reemphasized O'Keefe's conviction that avoidance of economic distress to the corporation and to the employees required the consummation of an agreement with the A. F. L. With a bland disregard for consistency, Collins reported to the employees that he was nevertheless attempting, in good faith, to negotiate an agreement with the C. I. O. He thought it necessary, however, to assure them that "None of you is going to be forced into any union you do not want to join," a promise which he forthwith proceeded to break by negotiating a closed-shop agreement with the A. F. L. unions on behalf of the partnership (R. I, 101–102 and n. 34; R. III, 1115–1116).

During the month of January 1946, despite his knowledge of the outstanding certification of the C. I. O. (R. I, 103; R. IV, 1447), W. G. Durant, the managing partner of the partnership, authorized Collins to negotiate a collective bargaining agreement with the A. F. L. (R. I, 103; R. IV, 1437, 1465). At the time these negotiations were authorized, the partnership had in its employ only fifteen production and maintenance employees, none of whom, according to Durant, belonged to any union; but the negotiations were undertaken with the view of embracing within the terms of the collective agreement the three hundred production and maintenance employees of the corporation whose transfer to the partnership was imminent (R. I, 103 and n. 36; R. IV, 1453–1454, 1436–1438, 1443, 1445–1446, 1464–1466). On January 31, 1946, following a few bargaining conferences with Collins (R. I, 103;

R. IV, 1444), thirteen representatives of the various A. F. L. Unions met with Durant in Collins' office in the plant, and executed a closed-shop agreement, predated to January 2, 1946 (R. I, 94, n. 25, 103, n. 37; R. IV, 1455–1458), covering all the production and maintenance employees of the plant (R. I, 103; R. IV, 1435–1437, 1464–1466, 1723–1738). The entire transaction was consummated in five minutes (R. I, 103; R. IV, 1445). No proof was required of the A. F. L. unions to show that, in fact, they represented a majority of the employees (R. I, 103–104; R. IV, 1436–1438, 1442–1443, 1445–1446). In this atmosphere of inordinate haste the corporation's employees were blanketed into the partnership's closed-shop agreement with the A. F. L. (R. I, 103–104, 105; R. IV, 1436–1438, 1442–1443, 1445–1446).

5. The announcement to the employees of their transfer to the partnership and of the closed-shop agreement with the A. F. L.

On February 1, 1946, the day following the execution of the closed-shop and manufacturing transfer agreements, President O'Keefe made an announcement to the employees to apprise them of the situation (R. I, 95–96; R. II, 504, 523; R. III, 1105–1109). He stated that (R. I, 95; R. III, 1106–1107):

> Some time ago I talked to you about having another firm manufacture our products and proceeded to work out what we felt to be a very satisfactory arrangement. These arrangement were to start February 1st, but inasmuch as this was the last day of the week, we changed the date to February 4th which is Monday. Consequently, starting Monday, the * * * [partnership] will do all the manufacturing for

> * * * [the corporation]. We [the corporation] will handle the sales, shipping, and service; also, all new construction work.

O'Keefe further stated that the agreement to transfer manufacturing facilities provided for the retention of all employee benefits, and he read relevant portions of the agreement to them (R. III, 1107). He stressed that the partnership's wage scale was higher than that of the corporation, and he promised that in appreciation of the employees' cooperation, the corporation would add to the January wages of the employees the difference between the two wage scales provided the employees continued in the partnership's employ through the month of February (R. I, 95–96; R. III, 1108).

The corporation's retroactive supplemental wage inducement was designed as a palliative to obtain the employee's accession to the requirement of the A. F. L. contract that all employees become members of the A. F. L. within fifteen days of the execution of the contract (R. I, 96 and n. 27; R. IV, 1724, R. II, 523). Roberts of the Stove Mounters, A. F. L., who also spoke to the employees on this occasion, "urged the boys to fall in line as soon as possible, to back the A. F. L." (R. I, 523).

6. The completion on February 4 of the transfer of employees and manufacturing facilities

On February 4, 1946, as agreed, the transfer of manufacturing facilities was completed and the partnership's manufactures of products on behalf of the corporation was undertaken (R. III, 1118–1119, 1211). In conjunction therewith, about three hundred pro-

duction and maintenance employees previously on the corporation's pay roll, with the minor exception of truck drivers, service and maintenance personnel, commenced employment with the partnership (R. I, 103, n. 36; R. III, 1231, 1331–1332, R. IV, 1515, 1525–1526, R. III, 1320–1321). Their "new" employment involved no more than a formal, paper transfer of records (R. III, 1320–1321, 1329–1331), and the plant's manufacturing and operating procedures continued in substantially the same routine as existed prior to the transfer (R. IV, 1370–1372, 1429–1431, 1452; R. III, 1333–1334). Thereafter, in conformity with the design to evade bargaining with the C. I. O., the corporation refused to bargain with the C. I. O. except with respect to the relatively few employees still on its nominal pay roll, and even as to them the corporation's president expressed reluctance to bargain (R. III, 1153–1154); the partnership, as an ostensible stranger to the certification, likewise refused to bargain with the C. I. O. (R. I, 77, 100–101; R. II, 777–778, 811–812; R. III, 950–951, 981–982, 1151; R. IV, 1438, 1515; R. III, 1307–1309).

II. The Board's conclusion of law

On the basis of the foregoing facts the Board concluded that respondents had engaged in a course of conduct which transgressed the rights guaranteed employees in Section 7 of the Act, in violation of Section 8 (1) and (5) of the Act. The Board found the elements of that illegal course of conduct to consist of, (1) the corporation's widespread participation in the electoral campaign on behalf of the A. F. L.

prior to the consent election (R. I, 82–84); (2) its continuing acts of assistance to the A. F. L. subsequent to the election (R. I, 96, 105–106); (3) the partnership's joinder in the course of unfair conduct dating from January 3, 1946, when the corporation during a bargaining conference with the C. I. O. announced for the first time the impending transfer of manufacturing facilities from the corporation to the partnership the objective of which was to negate the C. I. O.'s certification (R. I, 97–98, 102–103); (4) the refusal of the corporation and the partnership to bargain with the C. I. O. despite its outstanding certification (R. I, 98–101); (5) the entry into a closed-shop contract with the A. F. L. (R. I, 105–106); (6) the offer of a retroactive wage increase designed to palliate the displacement of the C. I. O. as the bargaining agent (R. I, 96); and (7) President O'Keefe's preelection speech of November 20 and postelection speech of November 27 which were coercive in character (R. I, 85–86, 83).

III. The Board's order and recommended modifications

The Board's order requires the corporation, the partnership, and the partners individually to cease and desist from (a) "urging, persuading, warning, or coercing their employees to join" the A. F. L., encouraging membership in the A. F. L., and discouraging membership in the C. I. O. or any other labor organization of their employees (R. I, 181–182); (b) recognizing or dealing with the A. F. L. as the exclusive bargaining representative of their employees unless and until it has been certified by the Board

(R. I, 182); (c) giving effect to the union-shop contract with the A. F. L. or any subsequent related agreement (R. I, 182–183); and (d) refusing to bargain collectively with the C. I. O. (R. I, 183).[7b] The Board's order further requires the corporation, the partnership, and the partners individually to take the "following affirmative action": (a) withdraw and withhold recognition from the A. F. L. as exclusive bargaining representative of their employees unless and until it shall have been certified by the Board (R. I, 183–184); (b) upon request, to bargain collectively with the C. I. O. (R. I, 184); and (c) to post appropriate notices (R. I, 184–185).

In its petition for enforcement of the Board's order (R. I, 195–207), the Board recommended modification of the order in certain respects to conform with the amendments to the Act (R. I, 202–204). In order to conform with the requirements of Section 8 (c) of the Act, as amended, the Board recommended that the words "urging, persuading, or warning" in paragraph 1 (a) of the order be modified by the words "by threat of reprisal or force or promise of benefit" (R. I, 202). In order to conform with the policy expressed in Section 9 (f), (g) and (h) of the Act, as amended, of withdrawing the aid of the Act's processes from a labor organization which fails to comply with the provisions of Section 9 (f), (g), and (h), to the extent only that the unfair labor

[7b] Board Member Reilly dissented only from that portion of the order on a ground discussed at pp. 85–87 *infra*. However, he did concur in the remainder of the order.

practice involves a refusal to bargain to be remedied by an order to bargain, the Board recommended that paragraphs 1 (d) and 2 (b) of the order, requiring respondents to bargain with the C. I. O., be conditioned upon the C. I. O.'s compliance with Section 9 (f), (g), and (h) within thirty days of the decree enforcing the order (R. I, 203). The Board also recommended modification of the posted notices to accord with the recommended changes in the order (R. I, 202–203, 203–204).

SUMMARY OF ARGUMENT

I. During the pre-election period of rival organizational activity between the C. I. O. and the A. F. L., the corporation illegally assisted the A. F. L. by permitting it to solicit membership on company time and property, by surreptitiously enlisting rank-and-file employees to aid the A. F. L. in that activity, and by permitting the holding of a pro-A. F. L. meeting on plant property.

Subsequent to the election, upon the C. I. O.'s certification as exclusive bargaining representative, the corporation initially, and subsequently the partnership, refused to bargain with the C. I. O. They frustrated the bargaining process by refusing to submit counterproposals, by inviting A. F. L. committees to attend the bargaining conferences, by announcing in the presence of these A. F. L. committees that bargaining would be futile because of an imminent transfer of manufacturing facilities from the corporation to the partnership, and by the contemporaneous execution of a closed-shop agreement with the A. F. L.

covering the same group of workers for whom the C. I. O. was certified as exclusive bargaining agent. The entry into the closed-shop agreement with the A. F. L. was the capstone of the plan to divest the C. I. O. of its bargaining rights and was the fruition of gross employer partisanship. It was bulwarked by further unlawful assistance to the A. F. L. in the form of a monetary award by the corporation to the employees in order to secure their acquiescence in the displacement of the C. I. O. as bargaining representative.

Section 8 (c) of the Act, as amended, does not protect the speeches in this case. That section specifically interdicts employer utterances which contain a "threat of reprisal or force or promise of benefit." It does not permit intrusion of the employer's economic power through speech which connotes compulsion or benefit. In determining the presence of a threat or promise, Section 8 (c) does not exclude reference to relevant extrinsic circumstances connected with the utterance. Judged by these criteria, the speeches in this case are coercive in character because they seek to instill in the employees fear for their job security should they, in disregard of the employer's will, choose to bargain through the C. I. O.

II. In the exercise of the wide degree of discretion entrusted to it in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees, the Board properly found that the consent election was fairly conducted and accurately reflected the employees' preference for the C. I. O.

III. The relationship between the corporation and the partnership, their joint relationship to the employees, and their common responsibility for the unfair labor practices, the effect of which must be expunged, justifies their amenability as joint employers to the remedial powers of the Act and makes appropriate the requirement that they bargain with the C. I. O. The C. I. O.'s status as the bargaining agent was unimpaired, not only because the presumption of the continuity of its majority status had not been rebutted, but also because any defection from it was attributable to the employer's unfair labor practices. The requirements that respondents cease recognizing the A. F. L. and giving effect to the contract with it are the acknowledged remedies for illegal assistance to a union culminating in a contract with it.

IV. The Board acquired jurisdiction over each partner individually by valid service of process and general appearance. In any event, the service and appearance were adequate to subject the partnership as an entity to the Board's jurisdiction.

V. Compliance by the C. I. O. with the provisions of Section 9 (f), (g), and (h) of the Act, as amended, is irrelevant to the enforcement of that portion of the Board's order which remedies the violations of Section 8 (1) of the Act. Compliance by the C. I. O. with Section 9 (f), (g), and (h) is, however, properly exacted as a condition precedent to the enforcement of that portion of the Board's order which requires the employer to bargain with the C. I. O. as a remedy for the violation of Section 8 (5) of the Act.

ARGUMENT

I. The Board's finding that respondent's course of conduct violated Section 8 (1) and (5) of the Act is supported by substantial evidence

In the contest between members of rival unions to secure the favor of a majority of the employees, the Act adjures the employer not to assist one union as against another. The Act's purpose is to eliminate insofar as possible the capacity for interference with the free choice of employees which inheres in the employer by virtue of his economic power. The common denominator of employer assistance to labor organizations, every form of which "is forbidden,"[8] is the employer's utilization of the property and personnel which he controls to bring the weight of his economic power to bear in favor of one union as opposed to another. A labor organization which is the beneficiary of such employer assistance has, of course, an undue advantage in that it attracts to membership those employees who are led to believe that by designation of the favored labor organization they will receive special consideration from the employer which would not inure to them from the selection of the unassisted union. Thus a favored labor organization, though it may not be the creature of the employer, is not, because of the intrusion of the economic power of the employer, the freely expressed choice of the employees. To such a situation the Board is required to bring to bear the remedial powers of the Act in order to divest the assisted

[8] *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685, 693.

union of its unlawful advantage and to restore the conditions of a free choice. Tested within the framework of these principles, so often reiterated as to be axiomatic, the conduct of the corporation and the partnership is shown to be in flagrant disregard of fundamental duties.[9]

A. The assistance to the A. F. L. prior to the election

The conduct of the corporation prior to the consent election constituted potent support to the A. F. L. in its organizational campaign. "The commencement of the * * * [C. I. O.'s] campaign for membership * * * brought cooperative action between the employer and the * * * [A. F. L.] to strengthen the latter's position." *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.,* 315 U. S. 685, 692. The introduction of the A. F. L. to the plant was facilitated through the efforts of Collins, the corporation's attorney and labor relations advisor. His office became the A. F. L.'s campaign headquarters. He donated to the A. F. L. the services of two rank and file employees who, on company time and property without loss of pay and in lieu of their customary work, proselytized for the A. F. L. One of them reported to the A. F. L.

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[9] *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72; *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685; *Elastic Stop Nut Corporation* v. *N. L. R. B.*, 142 F. 2d 371 (C. C. A. 8); *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553 (C. C. A. 3); *American Smelting & Refining Company* v. *N. L. R. B.*, 128 F. 2d 345 (C. C. A. 5); *N. L. R. B.* v. *National Motor Bearing Company*, 105 F. 2d 652 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237 (C. C. A. 9).

organizers in Collins' office and in his presence the state of employee opinion in the plant, and suggested and arranged for A. F. L. meetings in an effort to stir up enthusiasm for the A. F. L. Finally, fifteen minutes before the election, a pro-A. F. L. meeting of the Five and Over Club was permitted to be held on company time and property, a meeting which was announced to the employees through the foremen.

These activities are familiar forms of employer assistance to a labor union. The solicitation of membership on company time and property,[10] the surreptitious enlistment of rank and file employees for that purpose,[11] and the holding of a union meeting on plant property[12] have been uniformly condemned. In engaging in such interdicted conduct, a course which it continued to pursue after the election, the corporation furnished unlawful support to the A. F. L.

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[10] *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 231, note 8; *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72, 76–77; *American Smelting & Refining Company* v. *N. L. R. B.*, 128 F. 2d 345, 346 (C. C. A. 5); *Elastic Stop Nut Corporation* v. *N. L. R. B.*, 142 F. 2d 371, 375 (C. C. A. 8).

[11] *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553, 556 (C. C. A. 3); *Triplex Screw Company* v. *N. L. R. B.*, 117 F. 2d 858, 860 (C. C. A. 6); *Atlas Underwear Company* v. *N. L. R. B.*, 116 F. 2d 1020, 1022 (C. C. A. 6).

[12] *N. L. R. B.* v. *Pacific Gas and Electric Company*, 118 F. 2d 780, 784 (C. C. A. 9); *N. L. R. B.* v. *Lane Cotton Mills Co.*, 111 F. 2d 814, 816 (C. C. A. 5); *N. L. R. B.* v. *Idaho Refining Company*, 143 F. 2d 246, 248 (C. C. A. 9); *S. H. Camp & Company* v. *N. L. R. B.*, 160 F. 2d 519, 524 (C. C. A. 6).

B. The refusal to bargain and further assistance to the A. F. L.

Subsequent to the election, the certification of the C. I. O. as the statutory bargaining representative of the production and maintenance employees imposed upon the corporation the duty of entering into "sincere negotiations with the representatives of the employees" *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. 2d 18, 22 (C. C. A. 9). The test of sincerity is aptly summarized in *N. L. R. B.* v. *Boss Mfg. Co.*, 118 F. 2d 187, 189 (C. C. A. 7), and approved by this Court in *N. L. R. B.* v. *Montgomery Ward & Company,* 133 F. 2d 676, 684 (C. C. A. 9):

> Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours and other conditions of employment. Collective bargaining requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the employer and the employees to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented. [Cases cited.] Mere pretended bargaining will not suffice [cases cited], neither must the mind be hermetically sealed against the thought of entering into an agreement [case cited].

Tested by this standard, the course of negotiations in this case is a negation of the employer's duty to bargain.[13]

Throughout the negotiations between the C. I. O. and the corporation, whenever Collins, the corporation's representative, chose to conclude discussions on a given item, he would conveniently plead that he had not had an opportunity to study fully the C. I. O.'s proposals (*supra,* pp. 17–18). In order to preclude continued evasiveness, the C. I. O. at the fourth bargaining conference requested the submission of written counter-proposals to each item of its proposed contract. Despite his agreement to do so, Collins

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[13] Compare Section 8 (d) of the Act, as amended, which defines the duty "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *." This provision represents in essence legislative confirmation of the standard of good faith bargaining as administratively evolved and judicially approved prior to the Act's amendment. *Matter of National Maritime Union*, 78 N. L. R. B., No. 137; 22 L. R. R. M. 1289, 1296; Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 282 (1948); Weyand, The Scope of Collective Bargaining Under the Taft-Hartley Act, Proceedings of New York University First Annual Conference on Labor, 1948, p. 258. For representative earlier cases embodying this standard, see *Matter of St. Joseph Stock Yards Co.*, 2 N. L. R. B. 39; *Globe Cotton Mills* v. *N. L. R. B.*, 103 F. 2d 91, 94 (C. C. A. 5); *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 523–526; *N L. R. B.* v. *Pilling & Son Co.*, 119 F. 2d 32, 37 (C. C. A. 3); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. 2d 452, 459–460 (C. C. A. 7), cert. denied, 317 U. S. 650.

never complied with this reasonable request. Failure in this regard justified an inference of insincerity.[14]

Collins invited committees of A. F. L. adherents among the employees to attend the third and fourth bargaining conferences with the C. I. O. (*supra,* pp. 18–19). Such conduct, without more, justifies an inference of insincerity. "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representative of his employees. The obligation being exclusive, * * * it exacts 'the negative duty to treat with no other.'" *Medo Photo Supply Corporation* v. *N. L. R. B.,* 321 U. S. 678, 683–684. Seeking out minority groups among the employees was "subversive of the mode of collective bargaining which the statute has ordained

[14] *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 687 (C. C. A. 9); *N. L. R. B.* v. *Pilling & Son Co.*, 119 F. 2d 32, 37 (C. C. A. 3). The significance of the failure to submit counterproposals as indicative of bad faith bargaining is emphasized by the legislative history of the amendments to the Act. In observing that the obligation to bargain collectively, as defined by Section 8 (d) of the Act, as amended, "does not require either party to agree to a particular demand or to make a concession," the Senate Report on the bill which became the Act, as amended, stated that "It should be noted that the word 'concession' was used rather than 'counterproposal' to meet an objection raised by the Chairman of the Board to a corresponding provision in one of the early drafts of the bill." S. Rep. No. 105, 80th Cong., 1st Sess., 24. The corresponding provision of the House bill, as reported and passed, provided that the term "bargain collectively" "shall not be construed as requiring that either party * * * submit counterproposals." 1 Legislative History of the Labor Management Relations Act, 1947, Gov't Print. Off., 1948, pp. 36, 39, 163, 166; H. Rep. No. 245, 80th Cong., 1st Sess., 19, 21, 70. In conference, the House provision was abandoned in favor of the Senate version of the obligation to bargain. H. Conf. Rep., 80th Cong., 1st Sess., 34.

* * *" (*Ibid.*). Such conduct is on analogy and in principle no different from outright repudiation of the collective bargaining representative through "bargaining with individuals or minorities." *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376, 384; *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. 2d 676, 681–682 (C. C. A. 9).

The vice of Collins' conduct did not cease with arranging the presence of the A. F. L. committees at the bargaining conferences. He took the occasion of their presence to announce to the C. I. O. that its effort to negotiate a contract would probably prove futile because of the impending transfer of manufacturing facilities from the corporation to the partnership (*supra,* p. 18). Thus he sought actively to demonstrate to the employees the impotence of the C. I. O., to hearten the A. F. L. adherents, and through them to proclaim to all the employees that they would be given another opportunity of choosing the A. F. L. The utilization of a bargaining conference as a forum for the dissemination of views antagonistic to the bargaining representative is no more than another version of an employer's effort "to go behind the chosen bargaining agent and negotiate with the employees individually, or with their committees, in spite of the fact that they have not revoked the agent's authority [and] would result in nothing but disarrangement of the mechanism for negotiation created by the Act, disparagement of the services of the union, whether good or bad, and acute, if not endless, friction, which it is the avowed purpose of the Act to avoid or mitigate." *N. L. R. B.* v.

Acme Air Appliance Company, Inc., 117 F. 2d 417, 420 (C. C. A. 2), quoted with approval in *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. 2d 676, 681 (C. C. A. 9).

These overt manifestations of insincerity occurring during the bargaining conferences were verified by Collins' contemporaneous bargaining with the A. F. L. for the very same group of employees for whom the C. I. O. had been certified. It is hardly necessary to belabor the utter incompatibility between an honest effort to reach agreement with a certified union and concurrent bargaining with a rival union rejected by the employees at the polls. The entry into an agreement with the A. F. L. embodying a closed-shop provision preceded by a refusal to discuss a like union security provision with the C. I. O. demonstrates beyond doubt that it was not legitimate differences concerning the subject matter of the contract which prevented accord with the C. I. O. Rather, it was the willful effort of the corporation and the partnership, acting through Collins, their common agent, to exercise a veto power over the employees' choice of a bargaining agent which erected the unsurmountable barrier to agreement.

The foregoing conduct not only evidenced a refusal to bargain, but independently of that, in seeking to appeal to the employees over the head of their bargaining representative, it undercut the authority of the C. I. O., and constituted further assistance to the A. F. L.

C. Assistance to the A. F. L. through the closed-shop contract and the supplemental wage inducement

The entry into the closed-shop contract with the A. F. L. was the crowning point of the campaign to divest the C. I. O. of its bargaining rights. The quick negotiation of this agreement, without even requiring the A. F. L. to submit proof of representation interest which common prudence at least would seem to dictate in view of the recent and outstanding certification of the C. I. O. (*supra,* pp. 28–29), "is itself evidential of assistance to the contracting union." *N. L. R. B.* v. *John Engelhorn & Sons,* 134 F. 2d 553, 556 (C. C. A. 3).[15] Referring to a situation in which the employer executed a contract with one of two competing unions during an organizational campaign, the Court of Appeals for the Eighth Circuit characterized such conduct as a transgression of the employer's obligation "to maintain a total, complete and honest neutrality [citations]. [The employer] * * *, prior to the period of its contract negotiation, had shown its intention to swing its weight on the side of the [contracting union] * * *, and it could not have been unaware of the advantage given the [contracting union] * * * by signing a contract with that organization [citation]. The Board

[15] See also *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72, 79; *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685, 695; *N. L. R. B.* v. *National Motor Bearing Company*, 105 F. 2d 652, 659–660 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Company*, 148 F. 2d 237, 240 (C. C. A. 9); *Elastic Stop Nut Corporation* v. *N. L. R. B.*, 142 F. 2d 371, 376, 379–380 (C. C. A. 8); *N. L. R. B.* v. *Southern Wood Preserving Company*, 135 F. 2d 606, 607 (C. C. A. 5); *N. L. R. B.* v. *Century Projector Corporation*, 141 F. 2d 488, 489 (C. C. A. 2).

could find such an act, during a period of rivalry between competing unions, and under the circumstances, to be reasonably calculated to indicate the company's preference and to be a violation of the obligation of neutrality." *Elastic Stop Nut Corporation* v. *N. L. R. B.,* 142 F. 2d 371, 380 (C. C. A. 8). *A fortiori,* where, as here, the employer enters into a collective-bargaining agreement with a union which has been repudiated at the polls after the conclusion of the electoral contest in derogation of the union which was the victor in that contest, it is perfectly plain that the contract is the unlawful fruition of the grossest sort of employer partisanship.

Active support of the A. F. L. did not stop with the execution of the closed-shop agreement. In conjunction with the corporation president's announcement to the employees of the transfer of facilities from the corporation to the partnership, he stressed to them the increased wage rates which the employees would receive, and promised that the corporation would add to the January wages of the employees the difference between the two wage scales, to be paid to those employees who continued in the partnership's employ during the ensuing month of February (*supra,* p. 30). Clearly, since continuance in the partnership's employ required membership in the A. F. L. in accordance with the closed-shop agreement, this supplemental wage inducement was direct financial support to the A. F. L. in order to foster membership in it and defection from the C. I. O.

The grant of a monetary reward by an employer to his employees to induce them to abandon one union and adopt another is an intrusion of the employer's economic power in its most palpable form. It is of whole cloth with an employer's effort in a single union situation to induce his employees "by the grant of wage increases to leave the union" which the Supreme Court held constituted interference with the exercise of the rights guaranteed to employees under Section 7 of the Act. *Medo Photo Supply Corporation* v. *N. L. R. B.,* 321 U. S. 678, 685. In support of its conclusion, the Supreme Court cited *N. L. R. B.* v. *Falk Corp.,* 308 U. S. 453, 460–461, in which, through a company-dominated union, an aggravated form of an assisted union, the employer sought to thwart the organizational drives of legitimate labor organizations by the premature grant of a wage increase. The Supreme Court in the *Medo* case went on to say that "there could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return" (321 U. S. at 686).[16] Moreover, the gravity of the offense in this case is compounded by the fact that the supplemental wage in-

[16] See also, *S. H. Camp and Company* v. *N. L. R. B.*, 160 F. 2d 519 (C. C. A. 6) (joint announcement by the employer and one union of wage increases during pendency of an election between rival uions). *N. L. R. B.* v. *Elyria Telephone Company*, 158 F. 2d 868 (C. C. A. 6) (announcement by the employer of wage increases, without credit to union for its part in securing them, undercuts the authority of the union).

ducement was granted without consultation with the certified bargaining agent and in derogation of its authority.[17]

D. The respects in which the employer's utterances are coercive

Thus far we have considered the course of the unfair labor practices in this case in isolation from the preelection speech of November 20 and the postelection speech of November 27, delivered by O'Keefe, the corporation's president, which the Board found to be coercive in character (*supra,* pp. 12–13, 14–17). In order to insulate from consideration and appropriate remedial action the coercive aspects of their verbal conduct, respondents "cloak [themselves] in the raiment of the First Amendment to the Federal Constitution,"[18] and, since the amendments to the Act, in their answer to the Board's petition for enforcement (R. I, 215), they invoke as well the provisions of Section 8 (c) of the Act, as amended, which prescribe the permissible limits of employer utterance. Because the Board's order as it relates to respondents' verbal conduct, which the Board has recommended be modified to conform to the statutory language of Section 8 (c) (*supra,* p. 33), operates prospectively to regulate future employer behavior, it is appropriate to determine whether the utterances which form the basis for the order fall within the interdiction of the

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[17] *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 381–386; *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 684–685; *N. L. R. B.* v. *Winona Textile Mills*, 160 F. 2d 201, 209 (C. C. A. 8).

[18] *R. R. Donnelly & Sons Company* v. *N. L. R. B.*, 156 F. 2d 416, 419 (C. C. A. 7), cert. denied, 329 U. S. 810.

standard expressed in Section 8 (c).[19] Clearly, however, under Section 8 (c) "Employers still may not, under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in the exercise of rights guaranteed them by the Act";[20] nor does "the guaranty of freedom of speech contained in the First Amendment * * * guarantee him who speaks immunity from the legal consequences of his verbal actions."[21]

1. The standard expressed in Section 8 (c)

Section 8 (c) of the Act, as amended, provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

In interdicting utterances which contain a "threat of reprisal or force or promise of benefit," Congress

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[19] *N. L. R. B.* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. C. A. 2); *L. A. Young Spring and Wire Corp.* v. *N. L. R. B.*, 163 F. 2d 905, 907 (App. D. C.), cert. denied, 333 U. S. 837.

[20] *N. L. R. B.* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. C. A. 5).

[21] *N. L. R. B.* v. *Blatt Company*, 143 F. 2d 268, 274 (C. C. A. 3), cert. denied, 323 U. S. 774.

summarizes the abuse to be feared from employer persuasion which arises from the economic hold which an employer exerts over his employees. The measure of the right to speak is therefore struck at that point where the utterances assume overtones of compulsion or favor derived from an attempt, openly or covertly, to bulwark persuasion by economic power. "The use of economic power over men and their jobs to influence their action is more than the exercise of freedom of speech. Mere suggestions, when made by one who holds the power of economic coercion in a setting conducive to the exercise of that power, may have the unwarranted effect of exerting a coercive influence to which freedom of speech does not extend." *N. L. R. B.* v. *Continental Oil Company,* 159 F. 2d 326, 330 (C. C. A. 10).[23] In consequence, "pressure exerted

[23] Compare the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Black and Mr. Justice Murphy joined, in *Thomas* v. *Collins*, 323 U. S. 516, 543–544: "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment." The necessity for reconciling the ambivalent character of employer speech has found frequent expression of which the opinion in *Continental Box Co.* v. *N. L. R. B.*, 113 F. 2d 93, 97 (C. C. A. 5) is illustrative: "The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not *the use of economic power to coerce, compel or buy* the support of the employees for or against a particular labor organization." [Emphasis supplied.]

vocally by the employer may no more be disregarded than pressure exerted in other ways." *N. L. R. B.* v. *Virginia Electric & Power Company,* 314 U. S. 469, 477. For although "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty, * * * when to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Thomas* v. *Collins,* 323 U. S. 516, 537–538; *May Department Stores* v. *N. L. R. B.,* 326 U. S. 376, 386. Thus, in proscribing utterances which contain "threats of violence, intimation of economic reprisal, or offers of benefit" (S. Rep. No. 105, 80th Cong., 1st Sess., 23), Section 8 (c) in its substantive aspect, as explained by Senator Taft, chief sponsor of the legislation, "in effect carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into the law itself. * * *" 93 Cong. Record 3837.

In order to accomplish its remedial objective, which is to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters" within noncoercive limits (S. Rep. No. 105, 80th Cong., 1st Sess., 23), Section 8 (c) is designed to preclude a practice whereby utterances are condemned as coercive, or are considered as evidence, because of the commission of other unfair labor practices, remote in time and unconnected by

circumstances to the utterances. Thus as explained by the House Report, "if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct," the Board may not " 'infer,' from what the employer said, *perhaps long before,* that the discharge was for union activity." (H. Rep. No. 245, 80th Cong., 1st Sess., 33.) [Emphasis supplied.] As stated in the Senate Report, the Board may not hold "speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, *even though severable or unrelated.*" S. Rep. No. 105, 80th Cong., 1st Sess., 23. [Emphasis supplied.] "The necessity for this change in the law," explained the House Conference Report, was to prevent "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, *no matter how irrelevant or immaterial,* that some later act of the employer had an illegal purpose." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 45. [Emphasis supplied.] The ultimate evolution of Section 8 (c) had its origin in the need, as succinctly stated by Senator Ellender, one of the conferees, of precluding the condemnation of "a *casual* speech," "*no matter how remote or how separable,*" as "a part of the pattern of unfair labor practices." [Emphasis supplied.] 93 Cong. Record 4137. Giving effect to these views, the Board holds that an employer's statements which contain no threat of coercion "do not acquire a coercive character be-

cause the [employer] had on another occasion committed unfair labor practices." [24]

The remedial objective of Section 8 (c) does not, however, preclude the consideration of circumstances connected with and relevant to the utterance in order to determine its meaning. Whether words import a "threat of reprisal or force or promise of benefit" cannot be determined in isolation from the setting in which they are uttered, for, as Mr. Justice Holmes observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." [25] Consideration of the legislative evolution of Section 8 (c) confirms this view. Section 8 (d) (1) of the House bill provided that "the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act: Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not *by its own terms* threaten force

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[24] *Matter of Mylan-Sparta Co., Inc.*, 78 N. L. R. B. No. 161, 22 L. R. R. M. 1317; *Matter of Tygart Sportswear Co.*, 77 N. L. R. B. 613, 22 L. R. R. M. 1052; *Matter of Bailey Company*, 75 N. L. R. B. 941. The further objective of Section 8 (c), to eliminate the "compulsory audience" doctrine, that an employer's speech is coercive because the employees were ordered by the employer to listen to it (S. Rep. No. 105, 80th Cong., 1st Sess., 23), has likewise been effected. *Matter of Babcock & Wilson Co.*, 77 N. L. R. B. No. 96; 22 L. R. R. M. 1057, 1058.

[25] *Towne* v. *Eisner*, 245 U. S. 418, 425.

or economic reprisal." [Emphasis supplied.][26] Section 8 (c) of the Senate bill provided that "The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains *under all the circumstances* no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit."[27] [Emphasis supplied.] Because in conference Section 8 (c) in its final form was avowedly evolved, as is apparent from its wording, from the House provision and in substitution for the Senate provision,[28] the additions to and deletions from the House provision are of the utmost significance in ascertaining the meaning to be ascribed to the final form of the section. Apart from the addition of "promise of benefit" within the category of interdicted utterances, the single significant change in the House provision was the deletion of the phrase "by its own terms." The clear inference from this deletion is to signify recession from the view that the meaning of utterances was to be determined by consideration of the bare words alone without reference to the extrinsic circumstances integrally involved in their utterance. This interpretation is unimpaired by the failure to include in Section 8 (c) in its final form

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[26] Legislative History of the Labor Management Relations Act, 1947, Gov't. Print. Off., 1948, p. 183.

[27] *Id.* at p. 242.

[28] H. Conf. Rep. No. 510. 80th Cong., 1st Sess. 45; 93 Cong. Record 6443; 93 Cong. Record. 6859.

the phrase, "under all the circumstances," contained in the Senate provision. Explaining the conference agreement, Senator Taft stated that that phrase was deemed "ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices" (93 Cong. Record 6443); in short that the phrase might invite reintroduction of the practice of condemning utterances as coercive because of the commission of other unfair labor practices remote in time and unconnected by circumstances to the utterances (93 Cong. Record 6859–6860). During the debate, in response to a query whether statements may be considered in relation to acts to determine meaning, Senator Taft went on to explain, "All these questions involve a consideration of the surrounding circumstances. It would depend upon the facts. * * * There would have to be * * * circumstances to tie in with the act of the employer" (93 Cong. Record 6446.) Consequently, where a relevant factual nexus exists between expression and conduct, the meaning of the statement may be ascertained in relation to the circumstances of its utterance. As an objective observer concluded, "Section 8 (c) itself contains nothing to suggest that in determining the presence of a threat or promise the Board is to shut its eyes to extrinsic circumstances and look only to the naked words. In the labor field, as elsewhere, language

takes on its meaning from its context." Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 17 (1947).

2. The application of the standard expressed in Section 8 (c) to the utterances in this case

In the light of these criteria, we turn to consider the coercive character of the preelection speech of November 20 and the postelection speech of November 27 delivered by O'Keefe, the corporation's president. These speeches are inseparably interwoven verbal complements of respondents' course of nonverbal unfair conduct. The post-election speech inaugurated the campaign to induce a state of employee opinion in the plant which would acquiesce in the employer's substitution of the A. F. L. for the C. I. O. as the bargaining representative. It was designed to instill in them fear for their job security if adherence to the C. I. O. continued, to impair the employees' confidence in their recently designated representative, and to lull them into acceptance of the impending scheme by which the Board's certification of the C. I. O. would be bypassed and the obligation to bargain collectively avoided through the arrangement between the corporation and the partnership which the speech plainly presaged. Similarly, the preelection speech was the capstone of the corporation's comprehensive participation in the electoral campaign on behalf of the A. F. L. The economic assistance rendered the A. F. L. in the form of donations of the services of its employees and the

free use of its plant property for electioneering purposes was bulwarked by the representation that the job security of the employees with the corporation and in the industry and the continued prosperity of the corporation were dependent on the selection of the A. F. L. as bargaining agent.

Entirely aside from the sharp meaning which the speeches acquire when interpreted in relation to the circumstances integrally involved in their utterance, the preelection and postelection speeches are on their face coercive in character. In the postelection speech (*supra,* pp. 14–17), O'Keefe called the employees "the dumbest clucks in the world," albeit through the transparent device of quoting another person. He mentioned by name four C. I. O. employees, adverted to the corporation's past favors to them, implied that they were ungrateful, and concluded that he found it difficult to believe that they, and the other C. I. O. employees, "wished to work a hardship on the rest." The repressive character of the speech, marked by this public denunciation of named employees for their union affiliation, is further illustrated by O'Keefe's statement that "the future looked brighter than it ever did since we have been in business" until the choice of the C. I. O. as bargaining agent threw "a curtain that makes things darker than they have ever been." So dark indeed that two of the officers were so discouraged with the prospect of dealing with the C. I. O. that they wanted "to sell out." This augury of disaster was predicated upon an asserted fear that

an A. F. L. boycott would be invoked against the corporation's products by virtue of the employees' choice of the C. I. O. as their representative, a boycott which since 1937 had evidently not succeeded in impairing the corporation's continued prosperity. O'Keefe concluded that in order to avoid the consequences of the employees' improvident choice of the C. I. O., it would be necessary either to "contract enough of our labor to a firm with an A. F. of L. contract, in order that they would take us off the unfair sheet—or to take advantage of the possibilities to sell this business to some one who has an A. F. of L. organization." Similarly, the preelection speech stressed the theme that the prosperity of the corporation and the job security of the employees both with the company and in the industry in general depended on the selection of the A. F. L. as bargaining representative (*supra,* pp. 12–13).

The two speeches exploited the employees' fear for their job security in order to induce conduct in accord with the corporation's wishes. No more effective means of coercing the employee's judgment is available than the exploitation of his sensitivity to the need for retaining his job. Assertions by employers that by their own act as a consequence of unionization plant operations would be partially or wholly liquidated with a resulting curtailment of job opportunities have been uniformly condemned.[29] They are "tantamount

[29] *N. L. R. B.* v. *Polson Logging Company*, 136 F. 2d 314 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Company*, 118 F. 2d 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148

to a threat of loss of employment." *N. L. R. B.* v. *New Era Die Co., Inc.,* 118 F. 2d 500, 505 (C. C. A. 3). As succinctly expressed by the Court of Appeals for the Sixth Circuit in *Atlas Underwear Co.* v. *N. L. R. B.,* 116 F. 2d 1020, 1023 (C. C. A. 6):

> A statement to the employees * * * that it might be necessary to close the plant, made during a period when unionization of its employees was sought to be effected, must be regarded as coercive, notwithstanding sincere belief on the part of the petitioner's executives that such result would of necessity follow. *N. L. R. B.* v. *Asheville Hosiery Co.,* 4 Cir. 108 F. 2d 288. While a bona fide shut-down of a plant does not of itself constitute a violation of the Act, undoubtedly a threat or prediction that it might have to close, if unionized, must necessarily affect the judgment of its employees and interfere with their freedom of choice.

An appreciation of the gravity of the corporation's infraction of duty arising from the postelection speech, in its attempt to secure defection from the C. I. O. as bargaining agent by the threats to the employees' job security, is most strikingly high-lighted when considered in relation to the binding effect of the certification on the employees themselves. Employees who have designated a bargaining representa-

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F. 2d 237, 243 (C. C. A. 9); *N. L. R. B.* v. *Winona Textile Mills, Inc.*, 160 F. 2d 201, 205, 206–207 (C. C. A. 8); *N. L. R. B.* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 105 (C. C. A. 8); *N. L. R. B.* v. *Crow Bar Coal Co.*, 141 F. 2d 317, 318 (C. C. A. 10); *N. L. R. B.* v. *Van Deusen*, 138 F. 2d 893, 895 (C. C. A. 2); *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 311, 316 (C. C. A. 8); *N. L. R. B.* v. *Sunbeam Electric Manufacturing Co.*, 133 F. 2d 856, 860 (C. C. A. 7).

tive through an election conducted under Board auspices are in ordinary circumstances bound to their choice for a reasonable period, usually one year.[30] The justification for precluding the revocation of the union authority rests, as the Supreme Court has held, upon the recognition that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Frank Bros. Company* v. *N. L. R. B.,* 321 U. S. 702, 705. The "power to hold the employees to their choice for a season," based on the necessity for stability in bargaining relations in order to enhance the likelihood that the collective bargaining process will succeed, has been uniformly acknowledged.[31] Despite O'Keefe's own recognition that the employees could not even of their own volition revoke the authority of the C. I. O.—"Now I realize that the election is over—you have voted C. I. O. Even if you changed your minds tomorrow, we could not have another election for at least 6 months and maybe a year" (*supra,* p. 16)—he nevertheless sought to destroy the effectiveness of a bargaining relationship barely one week old. Under the circumstances, O'Keefe's exhortations are no more an exercise of the right of free speech

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[30] N. L. R. B. Twelfth Annual Report (Gov't Print. Off., 1948), p. 33.

[31] *N. L. R. B.* v. *Century Oxford Manufacturing Corporation*, 140 F. 2d 541, 542 (C. C. A. 2); *N. L. R. B.* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 221–222 (C. C. A. 4); *N. L. R. B.* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. C. A. 3); *N. R. L. B.* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (C. C A. 4); *N. L. R. B.* v. *Gatke Corp.*, 162 F. 2d 252 (C. C. A. 7).

than are the "verbal acts" of a contemnor who seeks to induce defiance of a court's decree,[32] or those of a tortfeasor who seeks to induce a breach of contract or the disruption of advantageous relations.[33]

The Board was fully warranted in concluding that the warnings to the employees that their job security depended upon the establishment of the A. F. L. and the displacement of the C. I. O. as bargaining agent carried a coercive import which vitiated the pre-election and post-election speeches. Although a "prophecy that unionization will ultimately lead to loss of employment is not coercive where there is no threat that the [employer] will use its economic power to make its prophecy come true,"[34] where, as here, the employer threatens "to sell out," "to contract enough of our labor to a firm with an A. F. L. contract," "to take advantage of the possibilities to sell this business to some one who has an A. F. L. organization" (*supra,* pp. 16–17), he proposes the utilization of his own economic power upon his own initiative to evoke an image of economic disaster designed to stampede the employees' judgment. The subject matter of job security in the hands of individuals who have the economic power over the jobs of their audience is so fraught with dangers of abuse that the Board is

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[32] *Gompers* v. *Bucks Stove & Range Company*, 221 U. S. 418, 435–439.

[33] *Lumley* v. *Gye*, 2 E. & B. 216 (Q. B. 1853); Restatement, Torts, Chapter 37, Topic 2, Inducing Breach of Contract or Refusal to Deal.

[34] *Matter of Mylan-Sparta Co., Inc.*, 78 N. L. R. B. No. 161; 22 L. R. R. M. 1317.

entitled closely to scrutinize the utterances to determine whether the right of free speech is being corrupted to obtain an unlawful end. In the discharge of its function "to decide upon the evidence" the coercive character of utterances, the Board's finding of fact, that respondents' verbal conduct was coercive, is so clearly supported by substantial evidence that it is not open to successful challenge on this record.[35]

[35] *N. L. R. B.* v. *Virginia Electric & Power Company*, 314 U. S. 469, 479; *N. L. R. B.* v. *Bird Machine Co.*, 161 F. 2d 589 (C. C. A. 1); *N. L. R. B.* v. *Trojan Powder Co.*, 135 F. 2d 337, 338–339 (C. C. A. 3); *N. L. R. B.* v. *American Laundry Machinery Co.*, 152 F. 2d 400, 401 (C. C. A. 2); *Peter J. Schweitzer* v. *N. L. R. B.*, 144 F. 2d 520, 524–525 (App. D. C.); *N. L. R. B.* v. *Pick Mfg. Co.*, 135 F. 2d 329, 331 (C. C. A. 7); *N. L. R. B.* v. *Peterson*, 157 F. 2d 514 (C. C. A. 6), cert. denied, 67 S. Ct. 979. We are not unmindful of those decisions by some Circuit Courts of Appeals which apparently regard a finding of coercion based upon employer utterances as open to independent judicial determination. *N. L. R. B.* v. *Continental Oil Company*, 159 F. 2d 326, 329 (C. C. A. 10); *N. L. R. B.* v. *J. L. Brandeis & Sons*, 145 F. 2d 556, 563 (C. C. A. 8); *Jacksonville Paper Company* v. *N. L. R. B.*, 137 F. 2d 148, 150 (C. C. A. 5), cert. denied, 320 U. S. 772. Compare, however, the opinion of the Eighth Circuit in *N. L. R. B.* v. *J. L. Brandeis & Sons*, 145 F. 2d 556, 564 (C. C. A. 8) that such a determination "is a question of law" with its own previous opinions that "the determination of the category into which the remarks fell was a question of fact for the Board, *N. L. R. B.* v. *Virginia Power & Electric Co.*, [314 U. S. 469], and the Board's finding on the fact may not be disturbed." *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 142 F. 2d 371, 378 (C. C. A. 8); *N. L. R. B.* v. *Laister-Kauffman Aircraft Corp.*, 144 F. 2d 9, 17 (C. C. A. 8); *Gamble-Robinson Co.* v. *N. L. R. B.*, 129 F. 2d 588, 591 (C. C. A. 8). Compare also the opinion of the Fifth Circuit in *Jacksonville Paper Company* v. *N. L. R. B.*, 137 F. 2d 148, 150 (C. C. A. 5) with its own previous opinion that where "reasonable minds could fairly have differed" concerning the import of statements, "the findings of the Board in this respect as in the others, must be accepted as substantially supported. * * *" *Continental Box Company, Inc.* v. *N. L. R. B.*, 113 F. 2d. 93, 97 (C. C. A.

II. The certification of the C. I. O. as the exclusive bargaining representative of the employees in an appropriate unit was based upon the free choice of the employees as reflected by a validly conducted election

In order to properly appraise the validity of certain objections raised concerning the propriety of the certification of the C. I. O., it is necessary to state in some detail the circumstances involved in the execution of the consent election agreement and in the conduct of the election.

A. The arrangement for a consent election

Following the filing of a Petition for Certification of Representatives by the C. I. O. on October 23, 1945 (R. I, 74; II, 750–751), three informal conferences were held to discuss the petition at the Board's Regional office in Los Angeles on November 5, 13, and 14, 1945, attended by representatives of the vari-

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5). The assumption that the fact finding function of the Board in relation to vocal coercion is more restricted than its function in relation to non-vocal coercion is at odds with the province assigned the Board in the Supreme Court's decision in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479. "* * * The question of how deeply an employers' relations with his employees will overbear their will "is the sort of problem" to decide which a board, or tribunal chosen from those who have had long acquaintance with labor relations, may acquire a competence beyond that of any court." *N. L. R. B.* v. *Standard Oil Company*, 138 F. 2d 885, 887 (C. C. A. 2). It may not be assumed that an administrative agency as an organ of the federal government will be any less zealous to guard the right of free speech than will other branches of the federal government. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 146.

ous A. F. L. unions,[36] the C. I. O., and the corporation (R. III, 967–968, 972). At the first conference, the composition of the unit and the feasibility of a consent election were discussed (R. II, 758–862, R. III, 956–959). The corporation objected to an election in which each of the craft groups in the plant would vote in separate units to determine whether they desired to be represented by the particular A. F. L. union concerned or the C. I. O. (or neither), thus opening the possibility that some of the employees in the plant would be represented by the A. F. L. and others by the C. I. O. (R. II, 760–761, R. III, 959). In order to obviate this objection, it was suggested, and subsequently agreed, that the A. F. L. unions would be designated on the ballot as Los Angeles Metal Trades Council, A. F. of L., and voted on as a single unit (R. II, 760–761, R. III, 959).[37] At the second conference, further details were ironed out (R. III, 968–972). At the third conference on the next day, November 14, an Agreement For

[36] Present at the first conference were representatives of the Stove Mounters, Carpenters, and Teamsters (R. III, 956). Present at the second conference were representatives of the Metal Trades Council of the A. F. L., Carpenters, I. A. M., Teamsters, Moulders, and the Stove Mounters (R. III, 969). Present at the third conference was a representative of the I. A. M., acting on behalf of the Metal Trades Council, A. F. L. (R. III, 972, 971, 978).

[37] This was in accord with a statement of Roberts of the Stove Mounters during a meeting in Collins' office between Collins and the various A. F. L. unions in the latter part of October 1945, at which time Roberts stated that up to the date of the election the plant would be treated as a single entity, but thereafter it would be divided in accordance with the jurisdiction of the various A. F. L. unions (R. I, 454–455, 440–442).

Consent Election was entered into, providing for an election to be held on November 20, 1945, among the employees in a unit described as "all production and maintenance employees excluding office clerical employees; guards, parcel post clerks; draftsmen; timekeepers; material expediters; pattern makers and pattern maker helpers other than those working in sheet metal; experimental laboratory workers; and supervisory employees," at which the employees would be given the opportunity to vote for the C. I. O., the Los Angeles Metal Trades Council, A. F. of L., or neither (R. I, 75; R. III, 971–978).[38]

[38] Although not a matter of record, it may be noted that subsequent to the execution of the consent election agreement on November 14, 1945, a communication from the American Federation of Labor Executive Council to the national organization of the I. A. M., dated November 19, 1945, effected the disaffiliation of the I. A. M. from the A. F. L. (Machinists Monthly Journal, January 1946, p. 17). Although they have not sought intervention in this proceeding to resist enforcement of the Board's order, on the basis of disaffiliation, the A. F. L. affiliates contended before the Board that the consent election agreement was not binding on them because signed on their behalf by a representative of the I. A. M. Clearly, however, the status of the I. A. M. as an affiliate of the A. F. L. on November 19 has no bearing on its authority to act on behalf of the A. F. L. unions on November 14. At the second conference at the Board's Regional Office on November 13, 1945, it was agreed among the A. F. L. unions that a representative of the I. A. M. would sign the consent election agreement in their behalf (R. III, 971). The consent election agreement was executed on the next day in accordance with that understanding (R. I, 75, n. 10; R. III, 978, 973–978), and the A. F. L. unions thereafter participated in the election on November 20 (*infra*, pp. 66–68). Subsequent thereto, the I. A. M. and the A. F. L. unions continued to cooperate with each other, and they were joint signatories to the closed-shop agreement executed with the partnership (R. IV, 1732–1734, 1723–1738). This continued cooperation was in accord with a directive of John B. Frey, presi-

B. The conduct of the election

The election resulting in the certification of the C. I. O. as the exclusive representative of the employees was conducted with uneventful regularity. Four days before the election, sample ballots were posted in conspicuous places throughout the plant (R. III, 1220–1224). The C. I. O., the A. F. L., and the corporation each chose two authorized observers to assist in the conduct of the election under the supervision of the Board's agents. Charles Spallino and John Lovasco acted on behalf of the A. F. L. (R. III, 1002). The six observers were divided into two teams, each team composed of one observer for each organi-

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dent of the Metal Trades Councils, A. F. L., who by letter dated January 28, 1946, instructed the local A. F. L. unions as follows:

"* * * under the jurisdiction of most Metal Trades Councils there are joint agreements with employers which include local unions of the International Association of Machinists. These agreements were entered into in good faith by the employers, and that good faith must be preserved. The Executive Council of the Metal Trades Department, for this valid reason, holds that the dissociation of the International Association of Machinists in no way invalidates these contracts, and that during the life of such joint agreements which includes local unions of the International Association of Machinists, the contract will be held as valid as though the International Association of Machinists had not been dissociated. In other words, such agreements are now in full force and effect, binding upon the local Metal Trades Councils, and equally binding upon the local unions of the International Association of Machinists (Machinists Monthly Journal, March 1946, p. 52)."

And by letter dated February 7, 1946, he stated:

"The dissociation of the International Association of Machinists is not intended to place any difficulty in the matter of jointly negotiating agreements with employers. (Machinists Monthly Journal, March 1946, p. 52)."

Consequently, for the purposes of this case, the formal status of the I. A. M. as an affiliate of the A. F. L. is irrelevant.

zation (R. III, 998–999, 1007–1008, 1010, R. IV, 1405–1410). The list of eligible voters, previously prepared by the personnel manager of the corporation in accordance with the agreement for consent election, was likewise divided into two parts in alphabetical order, A through K and L through Z (*ibid.*, R. IV, 1694–1703, R. III, 1217–1218). Each employee desiring to cast a ballot presented himself to one or the other of the teams of observers, depending upon the alphabetical designation of his name, and was checked off against the eligibility list (*ibid.*). At the conclusion of the balloting, each observer certified "that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote" (R. III, 1002).

The tabulation of the ballots was conducted under the scrutiny of observers for the corporation, the A. F. L. and the C. I. O., who were persons other than those who acted as observers in the conduct of the election (Cf. R. III, 1227 with R. III, 1002). The results of the tabulation were recorded in a Tally of Ballots which shows that of the 341 eligible voters, 2 cast void ballots, 177 voted for the C. I. O., 114 voted for the A. F. L., and 5 voted for neither (R. I, 75; R. III, 1226–1227). The Tally of Ballots contains the following certification signed by the C. I. O., the A. F. L., and the corporation observers. "The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and

accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this Tally" (R. III, 1227).

On November 28, 1945, no objections to the conduct of the ballot having been filed within five days of the service of the Tally of Ballots as prescribed by the terms of the consent election agreement (R. III, 976), the Regional Director issued a Consent Determination of Representatives, herein called the certification, in which he found and determined that the C. I. O. was the exclusive representative of the employees within the appropriate unit (R. I, 75, 87; R. III, 1229–1230).[39]

C. The propriety of the Board's conclusion that the election was properly conducted

Notwithstanding the demonstrable regularity of the electoral procedures followed in ascertaining the

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[39] Without previously intimating any objection thereto, the A. F. L. contended during the course of the hearing, although it has not sought intervention in this proceeding to resist enforcement of the Board's order, that the results of the election were not representative of the true wishes of the employees, because the A. F. L. was designated on the ballot as Los Angeles Metal Trades Council, A. F. L., rather than in the names of the individual craft unions. The A. F. L. had however agreed to the form of the ballot precisely as it appeared, and it may be safely assumed that it fully publicized the purport of the ballot to the prospective voters. There is no evidence in the record that the employees were in any way misled. The Supreme Court's conclusion in *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 380–381, with respect to a comparable objection to the form of the ballot is equally applicable here: "In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees."

wishes of the employees, the employer and the A. F. L. sought to impeach the results of the election. They relied upon a statement made during the course of the hearing by Charles Spallino, one of two observers for the A. F. L. during the election, that he had "been C. I. O. at heart all the time" and that he had not been acting "in good faith" for the A. F. L. (R. I, 87–88; R. III, 1037; R. II, 604). They contended that the election is thereby vitiated.

Their contention is, however, purely speculative since the record discloses no evidence that Spallino's objective conduct as an observer in any wise prejudiced the fairness of the election. Spallino with two others made up one of the two teams of observers (R. III, 998–999, 1007–1008, 1010, R. IV, 1405–1410). He was seated at a table flanked on either side by an observer for the C. I. O. and the corporation (*ibid.*). Because of his greater familiarity with the corporation's employees, he marked the portion of the eligibility list entrusted to his team (*ibid.*). The eligibility list was, however, available to the other two observers, who, as occasion warranted it, checked the list (*ibid.*). There is no showing that Spallino did not carry out his task as an observer with absolute honesty, or that he in any way hindered the conduct of the election. The complete failure of proof of objective misconduct is further borne out by the fact that no objection to the conduct of the election was in any way intimated by any of the parties until the hearing in the unfair labor practice proceedings nearly four months after the election, although the terms of

the consent election agreement [40] and the rules of the Board then in force [41] provide that the parties shall file objections to the conduct of the election with the Board within five days of the election. Failure to file objections with the Regional Director within the time allotted, in itself a sufficient reason for the Board to decline to examine into the merits of the belated objection,[42] demonstrates that the A. F. L. and the corporation observed no overt manifestations of misconduct which they themselves deemed meritorious, despite the fact that the results of the election went against their wishes.

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[40] "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within 5 days after the issuance of the Tally of Ballots" (R. III, 976).

[41] "* * * Upon the conclusion of such election, the designated agent shall cause to be furnished to the parties a Tally of Ballots. Within five (5) days thereafter, the parties may file with the designated agent an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election." National Labor Relations Board, Rules and Regulations, Series 3, as amended, effective July 12, 1944, Section 10. The present rules are to the same effect. Sec. 203.61, Rules and Regulations, Series 5.

[42] *N. L. R. B.* v. *A. J. Tower Co.*, 329 U. S. 324. In that case the Supreme Court upheld the Board's refusal to consider a challenge to the eligibility of a voter to participate in a Board election when the challenge is not made at the time the ballot is cast. The Court observed that "the Board's prohibition of post-election challenges * * * gives a desirable and necessary finality to elections, yet affords all interested parties a reasonable period in which to challenge the eligibility of any voter" (329 U. S. at 332–333). The Court noted that objections to the election as distinguished from challenges to a ballot "relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly" (329 U. S. at 334). In the case of objections, the Board authorizes a five-day period during which they may be filed.

Consequently, the A. F. L.'s contention reduces itself to a complaint that because of its subsequent discovery of Spallino's subjective attitude it would not have selected him to act as its observer, a matter wholly irrelevant to whether the election was properly conducted, and the employer's contention stands on the even more tenuous ground that it is surrogate to the A. F. L.'s grievance. "Whether either the company or the union or the employees opposed to the union are represented at the polls by observers is a matter exclusively within the discretion of the Board." *Semi-Steel Casting Company* v. *N. L. R. B.* 160 F. 2d 388, 393 (C. C. A. 8); *N. L. R. B.* v. *Worchester Woolen Mills Corp.* (C. C. A. 1), decided October 4, 1948. In exercising the privilege accorded by the Board, the selection of an observer later deemed to have been an improvident choice is no cause for ignoring the results of a fairly conducted election. Accordingly, the Board's conclusion that the facts do not justify setting aside the election is an appropriate exercise of the "wide degree of discretion" entrusted to it "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by

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Failure to adhere to the prescribed time limit, upon the principle enunciated in the *Tower* case, forecloses a consideration of the objections on the merits, since an unlimited opportunity to object "would tempt a losing union or an employer to make undue attacks * * * so as to delay the finality and statutory effect of the election results." 329 U. S. at 332; *Wilson Athletic Goods Mfg. Co.* v. *N. L. R. B.*, 164 F. 2d 637, 640 (C. C. A. 7); National Labor Relations Board, Tenth Annual Report, (Gov't. Print. Off., 1946), p. 25, n. 58.

employees" *N. L. R. B.* v. *A. J. Tower Company,* 329 U. S. 324, 330.

The Board properly found, in accordance with the agreement of the parties manifested in the consent election agreement, that the production and maintenance employees at the corporation's Los Angeles plant, excluding certain job classifications, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act (R. I, 88). It further properly found, in accordance with the results of the consent election, that the C. I. O. was the exclusive bargaining representative of the employees in the unit (R. I, 88–89), and that the corporation and the partnership as the employer of these employees, by refusing to bargain with such representatives had violated Section 8 (5) of the Act and that the course of conduct pursued by them to evade their obligation interfered with and coerced the employees in violation of Section 8 (1).

III. The Board's order is valid and proper

Recognizing that their employees were intent upon some form of unionization, the corporation and the partnership in this case sought to channel the employees' choice in a direction which would suit their business convenience, and resorted to the commission of unfair labor practices in order to achieve their end. Unlike other cases which have come before the courts, this case did not involve the present imposition of economic hardships upon the employer which induced a desperate resort to infractions of statutory duties in order to obtain relief from an actual state of distress. In either event, it is well-settled that "the

act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer."[43] Therefore, in order to dissipate the effects of the unfair labor practices, the Board shaped a remedy appropriate to the circumstances.

A. The propriety of the order requiring both the corporation and the partnership to bargain with the C. I. O.

The heart of the Board's order is the requirement that the corporation and the partnership bargain collectively with the C. I. O. as the representative of the production and maintenance employees at the Los Angeles plant. The primary objective which respondents sought to accomplish through the unfair labor practices perpetrated in this case was avoidance of the obligation to bargain with the C. I. O. The single means by which to reach and nullify that objective is an order requiring respondents to bargain in accordance with the certification. A remedy which accomplishes less is not only a partial and unsatisfactory solution, but, in effect, concedes success to the unlawful plan. It is within the Board's competence to avoid that result and to achieve a full rectification of the unfair labor practices.

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[43] *N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. C. A. 9) : *N. L. R. B.* v. *Gluek Brewing Company*, 144 F. 2d 847 (C. C. A. 8) ; *N. L. R. B.* v. *Hudson Motor Car Company*, 128 F. 2d 528, 532–533 (C. C. A. 6) ; *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553, 557 (C. C. A. 3) ; *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. 2d 748, 752 (C. C. A. 7) ; *N. L. R. B.* v. *National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. C. A. 2).

The certification of the C. I. O. issued on the basis of the choice of the employees as expressed in a secret ballot election constituted a definitive and authoritative determination that a majority of the employees within an appropriate unit had designated the C. I. O. as their exclusive collective bargaining representative. As long as that certification had force and vitality, the employer, whether it be, as initially, the corporation or, as later, the corporation and the partnership, was in duty bound to honor the certification and to bargain with the certified organization on behalf of the employees covered by it. Respondents seek to interpose as an obstacle to the enforcement of that duty the short-term lease executed between the corporation and the partnership whereby the latter assumed the operation of the plant manufacturing facilities together with the employment of most of the employees covered by the certification. That arrangement, which respondents characterize as an exercise of an "absolute legal right," is relied upon to devitalize the certification. The corporation claims that it is required to bargain only with respect to the relatively few employees continued upon its pay roll, and the partnership, as an ostensibly separate legal entity, asserts that the certification is not binding upon it. They deem as irrelevant (1) the force of the certification as a continuing determination of the organizational preferences of a given group of employees realistically unaffected by a change in the identity of the employer, (2) the interlocking relationship between the corporation and the partnership manifest from an analysis of their com-

mon family and financial control, and, independent of that, the measure of control exercised by the corporation over the partnership apparent on the face of the agreement between them, and (3) the financial contributions that the corporation makes to the partnership to meet its pay-roll expense. In short, respondents seek to avoid the substance of a valid obligation through the erection of a legal facade.

However, a change in the ownership of the business of an offending employer, whether ostensible or real, will not be permitted to enfeeble the redress of unfair labor practices. In conformity with the general rule that a judgment may, "in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons" (*Walling* v. *Reuter,* 321 U. S. 671, 674), compliance with a decree enforcing a Board order is exacted not only against "a disguised continuance of the old employer," which the partnership may very well be (*Southport Petroleum Co.* v. *N. L. R. B.,* 315 U. S. 100, 106), but also against a transferee who "on an appraisal of his relations and behavior" may be deemed to be "in active concert or participation" with the transferor in "carrying out prohibited acts," which the partnership certainly is (*Regal Knitwear Company* v. *N. L. R. B.,* 324 U. S. 9, 14–15). What is true as to the power to compel obedience to a decree in order to assure the redress of unfair labor practices, despite the fact that the transferee was not a party to the original administrative proceeding, is even more compellingly true as to a transferee whose relation to the

transferor has been developed at an administrative hearing upon notice.

The scope of the Board's power to reach each of the legal entities responsible for the infraction of statutory duties in order to effect a full redress of unfair labor practices is illustrated by the contrariety of situations in which the exercise of that power has been upheld as appropriate in the face of a challenge to its propriety. The controlling parent as well as the operating subsidiary of companies affiliated through common ownership;[44] the family or closely held business recast in the corporation or partnership form as well as the form through which it conducted its business prior to its transmutation;[45] the estate of the deceased partner as well as the surviving partners of a partnership dissolved through death;[46] the discharged reorganized company as well as the antecedent insolvent debtor in possession;[47] the lessees,

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[44] *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 262; *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197, 217; *N. L. R. B.* v. *Federal Engineering Co., Inc.*, 153 F. 2d 233 (C. C. A. 6); *N. L. R. B.* v. *Swift & Co.*, 127 F. 2d 30, 32 (C. C. A. 6); *N. L. R. B.* v. *Whittier Mills*, 111 F. 2d 474, 476 (C. C. A. 5); *Bethlehem Steel Company* v. *N. L. R. B.*, 120 F. 2d 641, 648–652 (C. A. D. C.); *N. L. R. B.* v. *Hearst*, 102 F. 2d 658, 659, 663 (C. C. A. 9); *N. L. R. B.* v. *Lund*, 103 F. 2d 815, 818–819 (C. C. A. 8); *N. L. R. B.* v. *Condenser Corporation of America*, 128 F. 2d 67, 71 (C. C. A. 3).

[45] *N. L. R. B.* v. *Adel Clay Products Company*, 134 F. 2d 342, 346 (C. C. A. 8); *De Bardeleben* v. *N. L. R. B.*, 135 F. 2d 13, 14 (C. C. A. 5).

[46] *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 183 (C. C. A. 6); *N. L. R. B.* v. *Wm. Tehel Bottling Company*, 129 F. 2d 250 (C. C. A. 8).

[47] *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 43–44 (C. C. A. 3); *N. L. R. B.* v. *W. C. Bachelder*, 125 F. 2d 387, 388 (C. C. A. 7).

vendees, and successors of a going concern as well as their lessors, vendors, and predecessors;[48] and independent contractors who have undertaken to perform a service for or operate a part of a business as well as the legal entity with whom they have contracted[49] have all been held amenable to the remedial powers of the Act where they have participated in, continued with, or profited from a course of unfair labor practices. The rationale underlying these decisions is expressed in the frequently cited decision of the Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 183 (C. C. A. 6):

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace * * *. It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.

Consequently, the relevant inquiry in this case is not whether the arrangement between the corporation

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[48] *N. L. R. B.* v. *National Garment Co.*, 166 F. 2d 233, 238 (C. C. A. 8); *N. L. R. B.* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (C. C. A. 4); *N. L. R. B.* v. *Weirton Steel Company*, 135 F. 2d 494, 498–499 (C. C. A. 3); *Union Drawn Steel Co.* v. *N. L. R. B.*, 109 F. 2d 587, 589, 595 (C. C. A. 3); *N. L. R. B.* v. *Hopwood Retinning Co, Inc.*, 104 F. 2d 302 (C. C. A. 2); *Le Tourneau Company of Georgia* v. *N. L. R. B.*, 150 F. 2d 1012 (C. C. A. 5.) Cf. *Matter of Alexander Milburn Co.*, 78 N. L. R. B. No. 87, 22 L. R. R. M. 1249.

[49] *N. L. R. B.* v. *Long Lake Lumber Company*, 138 F. 2d 363, 364 (C. C. A. 9); *Butler Bros.* v. *N. L. R. B.*, 134 F. 2d 981, 984–985 (C. C. A. 7); *N. L. R. B.* v. *Gluek Brewing Company*, 144 F 2d 847, 850, 853, 855, 857 (C. C. A. 8); *N. L. R. B.* v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 378 (C. C. A. 9).

and the partnership is an exercise of an "absolute legal right," but whether, in order to dissipate the effects of unfair labor practices, the relationship between the corporation and the partnership and their relation to the employees affected by the unfair conduct is such as to justify an order directed against both. Judged in terms of that relevant standard, there is no question as to the propriety of the Board's order requiring respondents to bargain with the C. I. O.

An analysis of the interlocking family and financial controls of the corporation and the partnership (*supra,* pp. 21–25) demonstrates beyond cavil that the holdings in the partnership, the control of it, and the earnings to be derived from it are in precise ratio with the corporate holdings, control and earnings. An analysis of the lease executed between them, for a term of less than one year, demonstrates that their arrangement contemplated in the main a division of function to the end that the partnership constituted the manufacturing arm and the corporation the purchases, sales and distribution arm of a single integrated enterprise (*supra,* pp. 25–26).[50] Utilities expense, repairs, taxes and insurance on plant and equipment are all borne by the corporation. The manufacture of products conforms to specifications and standards of care prescribed by the corporation. Materials and equipment necessary for their manufacture are furnished by the corporation. The partnership

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[50] *N. L. R. B.* v. *Condenser Corporation of America*, 128 F. 2d 67, 71 (C. C. A. 3); *N. L. R. B.* v. *Hopwood Retinning Co., Inc.*, 104 F. 2d 302, 304 (C. C. A. 2).

cannot manufacture or sell products on its own account without the written consent of the corporation. In short, as the managing partner of the partnership testified: "* * * we have no sales or intention of sales; we as Pioneer. We are strictly manufacturers" (R. IV, 1427).

As the *manufacturing* arm of the enterprise the partnership assumed the employment of most of the *production and maintenance* employees. All antecedent benefits which the employees enjoyed, including seniority, pensions, insurance, bonuses, and contributions to the Five and Over Club, were continued by the partnership. The cost involved in maintaining these benefits is borne directly by the corporation. In fact, all of the partnership's pay-roll expense is borne by the corporation, since the partnership's compensation for its services is measured by "*cost of labor* plus two and one-half percent" (*supra,* p. 26). The personnel manager testified that he observed no "substantial difference" in manufacturing procedure as a result of the transfer (R. III, 1333); the foreman of the foundry in which seventy-five to eighty men work testified that there was no change in the foundry's operations as a result of the transfer (R. III, 1366–1368, R. IV, 1369–1372); the president of the corporation testified that approximately the same number of production and maintenance workers were employed at the factory at the time of the hearing as of the date of the transfer (Cf. R. III, 1176, with R. IV, 1515); the managing partner of the partnership testified that changes in manufacturing procedures were in the planning stage only (R. IV, 1452).

In a word, no essential attribute of the employment relationship was changed *with the single exception that respondents refused even to pretend to bargain with the C. I. O. as the collective bargaining representative of the employees now nominally on the partnership's pay roll.*

The certification of the C. I. O. was, however, a definitive determination of the organizational preferences of the production and maintenance employees at the plant, and, in accordance with their duties under Section 8 (5) of the Act, it was incumbent upon respondents to bargain with the C. I. O. The continuing effectiveness of the certification as a criterion of the employees' choice was hardly abated by the change in the form in which respondents conducted their business. Any contention that the C. I. O. was no longer the designee of these employees can only be premised upon the proposition that when the legal ownership changed, the organizational preferences of the employees changed, a clear non sequitur.

This precise issue was before the Court of Appeals for Fourth Circuit in *N. L. R. B.* v. *Blair Quarries, Inc.,* 152 F. 2d 25 (C. C. A. 4). In that case, the lessee of a quarry, a stranger to the lessor, assumed the operation of the quarry. Three months prior to the lessee's assumption of operations, a union had been certified as the collective-bargaining representative of the employees at the quarry. The lessee refused to bargain with the union, and defended its refusal on the ground that the union did not represent a majority of the employees. It was held that the lessee was required to bargain with the certified union since "It is

the established rule that a certification must be deemed effective for a reasonable period after its issuance and it cannot be claimed that such a period had expired when the refusal * * * to bargain took place" (152 F. 2d at 26–27). Similarly, in this case barely two months had elapsed between the election and the transfer of manufacturing facilities. The certification therefore continued with undiminished vigor to represent the will of the employees.

This conclusion is not affected by the merger, alluded to in the dissent (R. I, 186), of the fifteen production and maintenance employees who were on the partnership pay roll prior to the transfer of manufacturing facilities into the appropriate unit initially composed solely of corporation's production and maintenance employees.[51] The C. I. O. won the election by a margin of 63 votes. Had all fifteen partnership employees participated in the election and voted against the C. I. O., the election results would not have been affected, and the C. I. O. would still

[51] Neither the A. F. of L. nor the C. I. O. sought to include the partnership's employees within the scope of the consent election agreement at the time it was negotiated. The C. I. O.'s decision was based on its belief that at the time of its organizational drive the parnership was no longer "an operating concern, * * * that it was a wartime operation and had gone out of existence along about V-J day or prior thereto" (R. III, 917, 915–917, 929–931). This belief was reasonable in view of the genesis of the partnership and the rapid drop in its employment from one hundred eighty employees on V-J day to fifteen employees at the time of the election (*supra*, p. 5). The A. F. L. did not offer an explanation. The omission of these employees from the election has no discernible relevance to the propriety of the Board's remedy shaped in the light of events as they actually transpired.

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have been the designated representative. Moreover, assuming that there had been no transfer of manufacturing facilities, and the corporation had continued as the sole employer, it could scarcely be contended that the certification of the C. I. O. would have been devitalized had the corporation hired fifteen additional employees. The situation here is essentially no different.

Consequently, the certification constituted the effective determination of the wishes of a majority of the employees. No evidence was introduced at the hearing to show that any defection from the ranks of the C. I. O. had occurred. In accordance with "the familiar rule that a state of affairs once shown to exist is presumed to continue to exist until the contrary is shown,"[52] initially applied by this Court to a labor relations situation,[53] the presumption of the continuity of the status of the C. I. O. as the established bargaining representative had not been overcome. In any event, even if the C. I. O. lost its majority status, the Board found (R. I, 97, 105–106) that such defection would be attributable to the unfair labor practices, and as this Court has held, could not "operate

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[52] *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660 (C. C. A. 9), noted in 9 Wigmore, Evidence § 2530 n. 4 (Supp. 3 ed. 1943). This rule has been uniformly followed. *N. L. R. B.* v. *Harris-Woodson Co., Inc.*, 162 F. 2d 97 (C. C. A. 4); *Oughton* v. *N. L. R. B.*, 118 F. 2d 486, 498–499 (C. C. A. 3) cert. denied, 315 U. S. 797; *N. L. R. B.* v. *Whittier Mills Company*, 111 F. 2d 474, 478 (C. C. A. 5); *N. L. R. B.* v. *Highland Park Manufacturing Company*, 110 F. 2d 632, 640 (C. C. A. 4); *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 554 (C. C. A. 6); *Colorado Fuel and Iron Corporation* v. *N. L. R. B.*, 121 F. 2d 165, 175 (C. C. A. 10).

[53] *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 96 F. 2d 197 (C. C. A. 9).

to change the bargaining representative previously selected * * * regardless of any shift in membership." *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242 (C. C. A. 9). Until the effects of the unfair labor practices are expunged by genuine bargaining, the C. I. O. must be recognized as the exclusive bargaining representative. *Frank Bros. Company* v. *N. L. R. B.*, 321 U. S. 702; *N. L. R. B.* v. *P. Lorillard Company*, 314 U. S. 512; *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72, 83; *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340; *N. L. R. B.* v. *Swift & Co.*, 162 F. 2d 575, 582–585 (C. C. A. 3), cert. denied, 332 U. S. 791.[54]

[54] In their answer to the Board's petition for enforcement, respondents contend "that the question presented by the Petition has become moot in that all employees of both concerns are and have been members in good standing of the various Crafts of the American Federation of Labor for over two years prior to the filing of the Petition herein" (R. I, 215). Inasmuch as respondents' closed shop agreement with the A. F. L. requires membership therein as a condition of employment with respondents, it would hardly be surprising were all employees presently members of the A. F. of L. Respondents do not undertake to explain, nor can we imagine, in what respect this fact would moot the case. On the contrary, as the cases cited in the text conclusively settle, respondents' complete success in securing defection from the C. I. O. through their course of unfair conduct requires an effective Board order in order to restore the condition of free employee choice.

In their answer too, in evident reference to Section 9 (b) (2) of the Act, as amended, which provides that "the Board shall not * * * decide that any craft unit is inappropriate for * * * [collective bargaining] purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation," respondents further contend that "the remedy requested in said Petition is inconsistent with the Labor-Management Relations Act of 1947 wherein it provides that, other things being equal, the Board should allow the craft preferences

Accordingly, the Board concluded that the corporation and the partnership "are joint employers of the employees here involved within the meaning of Section 2 (2) of the Act," and that "by refusing * * * to bargain with the * * * [C. I. O.] as the certified exclusive representative of its employees in the unit heretofore found to be appropriate, the respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (5) of the Act" (R. I, 111–112). In ordering respondents to bargain with the C. I. O., the Board followed the practice sanctioned by this Court. This Court's suggestion in *N. L. R. B.* v. *Hearst,* 102 F. 2d 658, 663 (C. C. A. 9), that "several corporations might, together, employ one man" was confirmed in *N. L. R. B.* v. *Long Lake Lumber Company,* 138 F. 2d 363, 364 (C. C. A. 9), where this Court enforced the Board's order requiring an individual and a company "as joint employers" to bargain collectively with the representative of a unit of employees. Similarly in this

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of the employees; that the employees' preference * * * is 100% various American Federation of Labor crafts" (R. I, 216). Not only do respondents oversimplify and misconstrue the legal purport of this provision (*see Matter of National Tube Co.*, 76 N. L. R. B. 1199, 21 L. R. R. M. 1292), but the factual situation in this case affords no occasion for its application. In a freely and fairly conducted consent election, based upon a unit fully agreed to be appropriate by all parties in the consent election agreement, the employees chose to be represented by the C. I. O. over the A. F. L. by a vote of 177 to 114 (*supra*, pp. 66–68). Not content to abide by the employees' expressed desires, respondents engaged in a course of unfair conduct designed to displace the C. I. O. and to establish the A. F. L. as bargaining representative. It is therefore not the Board, but respondents who are seeking to foist an unwanted bargaining agent upon the employees.

case, the relationship between the corporation and the partnership, their joint relationship to the employees, and their common responsibility for the unfair labor practices, the effects of which must be expunged, justifies their amenability as joint employers to the remedial powers of the Act.

This conclusion is unaffected by the finding, upon which Board Member Reilly relied in dissenting from the portion of the order requiring respondents to bargain with the C. I. O., that "certain OPA and tax advantages had some influence on the decision to transfer the manufacturing operations * * *"[55] (R. I, 179–180; R. III, 1027–1028, R. IV, 1428–1429). The Board's remedy achieves the precisely accurate result of permitting respondents to retain any lawfully derived advantages arising from their arrangement, but divests them of those advantages which spring from their infractions

[55] In resisting suits against dissolved corporations upon causes of action arising prior to voluntary dissolution, it is apparently standard pleading practice to allege that the dissolution was caused by the desire to lessen tax burdens. Marcus, *Suability of Dissolved Corporations* (1945), 58 Harv. L. Rev. 675. In *Walling* v. *Reuter*, 321 U. S. 671, where the Supreme Court considered the cause upon motion papers, an allegation that "the purpose of the dissolution is * * * to secure tax advantages" (*id.*, at 673) did not deter the Supreme Court from holding that an injunction obtained to restrain violations of the Fair Labor Standards Act is enforceable by contempt proceedings not only "against the corporation, its agents and officers and those individuals associated with it in the conduct of its business [citations], but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant" (*id.*, at 674).

of the Act. In sum, the conclusion of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Condenser Corporation of America,* 128 F. 2d 67, 71–72 (C. C. A. 3), upon a closely analogous state of facts, is particularly apposite here:

> Under these circumstances we believe the relationship of these two corporations is such that an order pursuant to the provisions of the statute is proper against both. * * * This is in no sense a penalty against the parties for an arrangement which is deemed by them to be in the interests of efficiency. It simply rests on the premise that where in fact the production and distribution of merchandise is one enterprise, that enterprise, as a whole, is responsible for compliance with the Labor Relations Act regardless of the corporate arrangements of the parties among themselves. What is important for our purpose is the degree of control over the labor relations in issue exercised by the company charged as a respondent. *Press Co. Inc.,* v. *N. L. R. B.,* 1940, 73 App. D. C. 103, 118 F. 2d 937. Regardless of what Cornell says concerning its connection with Condenser's employees it appears that "together, respondents act as employers of those employees * * * and together actively deal with labor relations of those employees." *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.,* 1938, 303 U. S. 261, 263 * * * "* * * the problem is not to be approached from the standpoint of vicarious liability." *Consolidated Edison Co. of New York, Inc.,* v. *N. L. R. B.,* 2 Cir., 1938, 95 F. 2d 390, 394, modified on another point, and affirmed, 1938,

> 305 U. S. 197. * * * It is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers. *N. L. R. B.* v. *Lund,* 8 Cir., 1939, 103 F. 2d 815, 819.

B. The remaining provisions of the order

The remaining provisions of the Board's order are the usual, judicially approved remedies for the unfair labor practices found and are clearly proper. The requirements that respondents cease recognizing the A. F. L. and giving effect to the contract with it are the acknowledged remedies for illegal assistance to a union culminating in a contract with it. *I. A. M.* v. *N. L. R. B.,* 311 U. S. 72, 75; *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, 695; *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d 652, 656–662 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Company,* 148 F. 2d 237, 244–246 (C. C. A. 9).[56]

[56] Although it has not sought intervention in this proceeding to resist enforcement of the Board's order, the Painters, A. F. L., contended specially before the Board that the contract should not be set aside with respect to it, because it did not participate in the arrangements for the consent election. The contention, properly rejected by the Board (R. I, 104), falls on three grounds. First, whether or not the Painters participated in the arrangements for the election does not alter the fact that it benefited from the illegal assistance rendered by respondents. Second, there is no doubt that the Painters as an A. F. L. organization would have followed the precise course agreed upon by the other A. F. L. unions, including its designation on the ballot in the name of the Los Angeles Metal Trades Council, A. F. L. The eligibility list indicates that four painters participated in the election (R. I, 104; R. IV, 1695, 1698, 1699, 1700). It is therefore unable to show any prejudice.

IV. The Board acquired jurisdiction over each partner by valid service of process and general appearance

It is contended that service of process by the Board upon some of the partners was defective. The scope of the objection to the service, beyond its bare assertion, was not stated with particularity. It is clear that the Board's jurisdiction over each of the partners was properly invoked both by service in conformity with the provisions of the Act and by general appearance entered on behalf of each of the partners.

Section 11 (4) of the Act provides that:

> Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail. * * * The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return postoffice receipt * * * therefor when registered and mailed * * * as aforesaid shall be proof of service of the same.

Third, during the course of an investigation of representatives, the Board's agents make diligent efforts to ascertain the identity of all unions claiming an interest among the affected employees. It is the uniform practice to post election notices throughout the plant before the election, and in this case election notices were posted four days before the election (*supra*, p. 66). Interested employees are thereby afforded an opportunity of notifying the union of their choice of the prospective election. These usual precautions afford practical certainty that all interested unions have an opportunity of participating in the election, and a belated claim to representation subsequent to the election, in the absence of unusual circumstances, cannot be permitted to disturb the necessary finality of the election results. See, *supra*, p. 70, n. 42: *Matter of the United Boat Service Corporation*, 55 N. L. R. B. 671.

In conformity therewith, the following documents were served upon each of the partners by post-paid, registered mail: (1) Complaint, charge, and notice of hearing, (2) amended complaint, (3) order postponing hearing, amended charge, and second amended complaint (Bd's Exhs. 1–D, 1–G, 1–O).[57] Service in the foregoing manner was attested to under oath by the Board's agent making the same (*Ibid.*). Return receipts, subscribed to either by the partner or his agent, indicate that each partner received the registered documents (Bd's. Exhs. E–1, E–2, H–1, H–2, P–1, P–2).[58] At the outset of the hearing, the attorney for the respondents entered a general appearance on behalf of the corporation, the partnership, and each partner individually (R. I, 224). During the first day of the hearing, the attorney for respondents filed with the attorney for the Board a joint answer on behalf of the corporation, the partnership, and the partners individually pleading to the merits of the allegations of the Board's complaint, amended complaint, and second amended complaint (R. I, 275, 37–42). No defect of service was alleged. During the course of the hearing, at which the partnership's defense on the merits was fully litigated,

[57] Although included in the Board's designation of record, these exhibits were not printed in the record. They are available for examination in the transcript of record certified by the Board to the Court.

The documents mentioned in the exhibits were mailed to the partners at their addresses as indicated on the certificate of business fictitious firm name filed with the county clerk by the partnership pursuant to California Law (R. IV, 1703–1716). Calif. Civil Code, § 2466–§ 2471 (Deering, 1941).

[58] See note 57 above.

two of the partners, William John O'Keefe and Wilbur G. Durant, the managing partner, testified on behalf of the partnership (R. IV, 1487, 1414).

Following the entry of a general appearance on behalf of each partner, the attorney for respondents, primarily in support of a motion to postpone the hearing, vaguely intimated lack of adequate notice to some of the partners without definitely identifying those partners as to whom the alleged defect pertained (R. I, 232, 272). In support of the motion for a continuance, an affidavit of one of the partners was submitted authorizing the attorney to represent the partnership and five of the seven partners at the hearing, but purporting to be unable to authorize the representation of the remaining two partners, Marion Jenks and Wilbur G. Durant, who were asserted to be absent from Los Angeles (R. IV, 1663–1664). As to Durant, however, service was admitted at the hearing (R. I, 247–248). Consequently, only partner Marion Jenks is alleged to have been without notice.

Respondent's motion for a continuance was granted, as was that of the A. F. L. which requested a continuance for independent reasons, and the hearing was postponed one week (R. I, 282). After the resumption of the hearing one week later, the attorney for respondents stated that he was "now appearing on behalf of those respondents who have been properly served" (R. I, 290). Upon being asked to identify those individuals, he stated, "I don't see where it is incumbent upon me to state those I do

represent and those I do not, other than to say I will represent all those that have been properly served" (R. I, 291). No evidence was introduced during the hearing to support the ultimate contention that service on one or more of the partners was defective.

Service of process upon each partner and proof of service thereof was made in conformity with the provisions of the Act. Cf. *N. L. R. B.* v. *Hearst,* 102 F. 2d 658, 662 (C. C. A. 9). No evidence of miscarriage of service was introduced. Consequently, its presumptive adequacy stands unrefuted. It is accordingly plain that the Board acquired jurisdiction over the person of each partner. Moreover, it is elementary that defects in service, if any there were, were cured by submission to the jurisdiction of the Board through the general appearance entered on behalf of each partner at the outset of the hearing and evidenced as well in the answer to the Board's complaint. An attempt to withdraw the general appearance subsequent to its entry in order to question the service is precluded in the interests of orderly procedure and prevention of prejudice to adverse parties. *Creighton* v. *Kerr,* 1 Colorado 509, affirmed 87 U. S. 8; *Eldred* v. *Bank,* 84 U. S. 545; *Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve,* 174 U. S. 603, 606. Consequently, the Board's order directed against each partner in his individual capacity is clearly proper. In any event, since the well-nigh universal demise of the common law doctrine that service upon each partner present within the jurisdiction is necessary

to subject the partnership to jurisdiction,[59] the order directed against the partnership in its name, based upon the admitted service upon the managing partner, the affidavit of representation as to five partners, and the appearance at the hearing of two of the partners, is undeniably appropriate, particularly in view of Rule 17 (b) of the Federal Rules of Civil Procedure which provides "that a partnership or other unincorporated association * * * may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

V. The provisions of the Board's order requiring respondents to bargain with the C. I. O. are properly conditioned upon compliance with Section 9 (f), (g), and (h), but the remaining provisions of the order are properly enforceable unconditionally

In its petition for enforcement of the Board's order, the Board recommended that the enforcement of those portions of the order requiring respondents to bargain

[59] See, e. g. Fed Rules Civ. Proc., 4 (d) (3) and (7), 17 (b); *Sugg* v. *Thornton*, 132 U. S. 524; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 383–392; *Bowles* v. *Marx Hide & Tallow Co.*, 4 F. R. D. 297, *Jardine* v. *Superior Court*, 213 Cal. 301, 2 Pac. (2d) 756; *Cotten* v. *Perishable Air Conditioners*, 18 Cal. 2d 635, 116 Pac. (2d) 603; Note, 136 A. L. R. 1071 (1942); Note, 79 A. L. R. 305 (1932); 1 *Moore's Federal Practice* 313–314 (1938); 2 Id. 2097–2102 (1938). Some courts, even without the aid of a statute, deemed it "clear on both reason and authority that service upon one or more members of a partnership in a suit instituted against the firm is a good service for the purpose of affecting the partnership with notice and in the event of recovery of binding the partnership property." Magruder and Foster, *Jurisdiction Over Partnerships* (1924), 37 Harv. L. Rev. 793, 799–800; Note, 136 A. L. R. 1071–1072 (1942).

with the C. I. O., paragraphs 1 (d) and 2 (b), be conditioned upon compliance by Local 1981, Stove Division, United Steelworkers of America, C. I. O., and its parent body, United Steelworkers of America, with the provisions of Section 9 (f), (g), and (h) of the Act, as amended, within thirty days of the decree enforcing the order (R. I, 203–204). It is the Board's position that compliance with Section 9 (f), (g), and (h) by the labor organizations involved may appropriately be exacted as a condition precedent to the enforcement of that part of the order which requires respondents to bargain with the C. I. O., but that compliance is irrelevant to the enforcement of the remaining provisions of the order.

In their motion to intervene, the local union and Philip Murray, individually and as president of the parent body, state that the parent body "has already complied with Section 9 (f) and (g) of the Act, as amended" and that the local union "will comply with said sections within thirty (30) days from any decree of this Court" (R. IV, 1774). They state, however, that "neither the officers" of the parent body "nor the officers" of the local union "have complied with Section 9 (h) of the Act, as amended, nor will said officers comply," and urge as their reason "that the provisions of Section 9 (h) of the Act, as amended, are illegal, unconstitutional and void on the ground that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States" (R. IV, 1774). It is clear therefore that, apart from their challenge

to the constitutionality of Section 9 (h), they do not question the propriety of the interpretation of Section 9 (f), (g), and (h) as requiring compliance therewith as a condition precedent to the enforcement of the order to bargain. Respondents, on the other hand, in their answer to the Board's petition, appear to contend that compliance with Section 9 (h) is a necessary condition precedent to the enforcement of the order in its entirety, and not simply to the enforcement of that portion of the order which requires them to bargain with the C. I. O. This portion of the brief will be devoted solely to showing the propriety of the Board's interpretation of Section 9 (f), (g), and (h). The constitutionality of Section 9 (h) will be briefed in reply to the brief of the intervenors, Local 1981 and Philip Murray, who stand as moving parties on this phase of the case.[60]

Section 9 (f), (g), and (h) of the Act, as amended, became effective August 22, 1947 (Sec. 104, the Act, as amended). The second amended complaint in this case was issued on February 20, 1946 (R. I, 34). The hearing was held on various days from March 6, 1946, through March 28, 1946 (R. I, 67), the intermediate report was issued on June 4, 1946 (R. I, 117), and the Board's decision and order, finding and remedying violations of Section 8 (1) and (5) of the Act, were issued on August 26, 1946 (R. I, 185). In short, every step in the proceedings before the Board through final order was completed almost one year prior to the effective date of the amendments to the Act.

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[60] The constitutionality of Section 9 (f) and (g) has been sustained in *N. M. U.* v. *Herzog*, 334 U. S. 854.

In cases which rest upon outstanding complaints that antedate the effective date of the amendments to the Act, it is the Board's position and settled practice to distinguish between those aspects of the case which relate to violations of Section 8 (1), (2), (3), and (4) of the Act and those aspects of the case which relate to violations of Section 8 (5) of the Act, insofar as the applicability of Section 9 (f), (g), and (h) is concerned. Where the Board's order is designed to remedy an infraction of Section 8 (1), (2), (3), or (4) of the Act, compliance with Section 9 (f), (g), and (h) by the labor organization upon whose charge the case was initiated is irrelevant.[61] Where the Board's order is designed to remedy an infraction of Section 8 (5) of the Act, by an order to bargain, the Board conditions the order to bargain upon the future compliance of the labor organization with Section 9 (f), (g), and (h).[62] And where, as here, the unfair conduct entails a refusal to bargain in addition to other violations, only that portion of the Board's order which remedies the refusal to bargain is conditioned upon the future compliance by the labor organization with Section 9 (f), (g), and (h).[63] The propriety of the Board's position and practice entails consideration of the precise scope of the section.

Section 9 (f) provides for the filing of organizational and financial reports by a labor organization with the Secretary of Labor and for the furnishing

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[61] E. g., *Matter of E. L. Bruce Co.*, 75 N. L. R. B. 522.

[62] E. g., *Matter of Marshall and Bruce Company*, 75 N. L. R. B. 90.

[63] E. g., *Matter of Sifers Candy Co.*, 75 N. L. R. B. 296.

of financial reports by a labor organization to its members. Section 9 (g) provides that this information shall be brought up to date and filed with the Secretary of Labor and furnished to the members annually. Section 9 (h) provides for the filing with the Board by "each officer" of a labor organization of an affidavit attesting "that he is not a member of or supports any organization that believes in or the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in, or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." Each subsection provides that the same data shall be filed by "any national or international labor organization of which" the filing labor organization "is an affiliate or constituent unit." The failure of a labor organization or its officers to comply with Section 9 (f), (g), and (h) precludes the Board from (1) investigating a question concerning representation raised by the labor organization, (2) entertaining a petition for a union shop election on behalf of the labor organization, or (3) issuing a complaint pursuant to a charge filed by the labor organization.

In *Matter of Marshall and Bruce Co.,* 75 N. L. R. B. 90, the Board, in considering the applicability of Section 9 (f), (g), and (h) to complaints issued prior to the effective date of the amendments to the Act, concluded that it did not affect the Board's power to proceed upon complaints already issued notwithstanding noncompliance, and stated its rationale as follows (75 N. L. R. B. at 95):

> * * * This particular complaint issued in 1946, long before the passage of the Labor Management Relations Act. Section 9 (f) and (h) provide that "no complaint *shall* be issued" and Section 9 (g) provides that "no complaint shall issue" in the event of noncompliance. The use of the term "shall" in such a context has been held to indicate legislative intent that an Act apply only to actions taken *after* the effective date of the Act and not to affect actions taken prior thereto. * * * We *unanimously* conclude that, in view of the prospective language of the amendment and the recognized rule of construction with respect to statutory changes in matters of procedure the current failure of the Union to comply with Section 9 (f), (g), and (h) does not impair the Board's *power* to issue the usual remedial order requiring that the respondent unconditionally bargain upon request with the Union. Nor would it limit our power to issue our usual remedial orders for violations of Section 8 (1), (2), (3), or (4) of the old statute if such were here involved.

The Board's conclusion quoted above is supported by recent decisions of the several courts of appeals squarely in point. In *N. L. R. B.* v. *Whittenburg,* 165 F. 2d 102, 104–105 (C. C. A. 5), the Court of Appeals for the Fifth Circuit, enforcing unconditionally a Board order remedying violations of Section 8 (1) and (3) of the Act (66 N. L. R. B. 1442, 1443–1444), stated:

> The changes or amendments made by sections 9 (f), (g), and (h) of * * * [the Act] are

> procedural changes which, according to the well-established rule, are applicable to pending cases only to the extent that the procedural steps dealt with have not yet been taken. *Dunlap* v. *United States,* 43 F. 2d 999; Rule 86, Federal Rules of Civil Procedure; *Bowles* v. *Strickland,* 151 F. 2d 419. The case at bar is an unfair-labor-practice proceeding with respect to which sections 9 (f), (g), and (h) require compliance only as a condition precedent to the issuance of a complaint. The issuance of the complaint in this case is a procedural step which was taken on March 10, 1945, more than two years before the amendments in question were enacted, and it is therefore governed by the law in effect at the time it was taken.

Similarly, in *N. L. R. B.* v. *Mylan-Sparta Company, Inc.,* 166 F. 2d 485, 487, 488, the Court of Appeals for the Sixth Circuit, rejecting a contention that the charging union's failure to comply with Section 9 (f), (g), and (h) invalidated a Board order remedying violations of Section 8 (1) and (3) of the Act (70 N. L. R. B. 574, 580–583) stated:

> the furnishing of the information and the filing of the affidavit [required by the amendments] are conditions precedent *to the filing of a complaint* under the 1947 Act. The complaint in the present case was not filed under the 1947 Act but was filed under the provisions of the * * * [1935 Act]. The amendment of the 1935 Act by the 1947 Act did not release or extinguish any of the liabilities which had been incurred under the original act. Such liabilities are expressly reserved by 1 USCA, Sec. 29.

> See *United States* v. *Reisinger,* 128 U. S. 398; *Hertz* v. *Woodman,* 218 U. S. 205, 217–218. In any event, the complaint in this proceeding had been issued, the decision and order of the Board had been entered, and the petition to enforce the order been filed before the effective date of the 1947 Act, which by its express terms, insofar as it applies to this issue, merely provides "no complaint shall be issued." The Act is prospective, not retroactive, in its effect.

And the Court of Appeals for the Eighth Circuit, in *N. L. R. B.* v. *National Garment Co.,* 166 F. 2d 233, 235–238 (C. C. A. 8), quoting extensively from the Board's decision in the *Marshall and Bruce* case, *supra,* also expressed its approval of the Board's rationale.[64]

These decisions,[65] supporting the Board's position with respect to the impact of Section 9 (f), (g), and (h) of the amended Act upon the Board's power to issue unconditional remedial orders, where its complaint has issued prior to the effective date of the amendments, are in accord with the recognized rules of statutory construction applied by the courts, to language such as that which appears in Section 9 (f),

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[64] And see *N. L. R. B.* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. C. A. 5); *N. L. R. B.* v. *Caroline Mills, Inc.,* 167 F. 2d 212, 214 (C. C. A. 5).

[65] In numerous other cases decided by the courts since the effective date of Section 9 (f), (g), and (h), orders remedying violations of Section 8 (1), (2), (3), and (4) have been unconditionally enforced without any reference to Section 9 (f), (g), and (h). Thus see *Donnelly Garment Co.* v. *N. L. R. B.,* 165 F. 2d 940 (C. C. A. 8); *N. L. R. B.* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660 (C. C. A. 2); *N. L. R. B.* v. *Stowe Spinning Co.,* 165 F. 2d 609 (C C. A. 4).

(g), and (h). The repetitive use in this section of the phrase "no complaint shall issue" or "be issued" clearly discloses a legislative intent to look to future complaints and not to govern proceedings where the complaints had been issued prior to the effective date of the amendment. See *Richard* v. *National City Bank,* 6 F. Supp. 156 (D. C. N. Y.); *Ex parte Morel,* 292 Fed. 423, 428 (D. C. Wash).

These decisions are also in accord with the well-established rule that procedural changes in a statute are "applicable only to proceedings taken after the amendment and not to proceedings taken prior thereto." 1 Sutherland, *Statutory Construction,* Section 1936, p. 438, note 13 (3d Ed. 1943). So, "where a new statute deals with procedure only, *prima facie* it applies to all actions—to those which have accrued or are pending, and to future actions. But the steps already taken, the pleadings, and all things done under the old law will stand, unless an intent to the contrary is plainly manifest." 2 Sutherland, *op. cit. supra,* Section 2212, p. 136.

As Mr. Justice Cardozo stated in *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 130 N. E. 288, 290, a statutory amendment affecting a procedural step is deemed inapplicable to pending cases where otherwise "the effect is to reach backward, and nullify by relation the things already done [citing cases]. There can be no presumption, for illustration, that a statute regulating the form of pleadings or decisions is intended to invalidate pleadings already served, or decisions already filed." Procedural changes affect

pending cases only to the extent that the procedural steps dealt with in the amendment have not yet been taken.[66] Future steps in pending cases, of course, are governed by the new law.[67]

This doctrine was embodied in Rule 86 of the Federal Rules of Civil Procedure, which provides that the new rules shall govern "all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies." Rule 86 has been construed by the federal courts as requiring that all procedural steps taken prior to the effective date of the new rules be tested under

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[66] See *Dunlap* v. *United States*, 43 F. 2d 999, appeal dismissed, 45 F. 2d 1021 (C. C. A. 9); In *re Jacobs*, 31 F. Supp. 620; *Hubbell* v. *United States*, 4 Ct. Claims 37; *Robinson* v. *State*, 177 Ind. 263, 97 N. E. 929; *Secor* v. *State*, 118 Wisc. 621, 95 N. W. 942; *Boyda Dairy Co.* v. *Continental Casualty Co.*, 299 Ill. App. 469, 20 N. E. (2d) 339; *Bedier* v. *Fuller*, 116 Mich. 126, 74 N. W. 506; *Richardson* v. *Fitzgerald*, 132 Iowa 253, 109 N. W. 866; *Marks* v. *Crow*, 14 Ore. 382; 13 Pac. 55; *Salt Lake Coffee & Spice Co.* v. *District Court*, 44 Utah 411, 140 Pac. 666, 668–669; *Hanover National Bank* v. *Johnson*, 90 Ala. 549, 8 So. 42; *East Pratt Coal Co.* v. *Jones*, 16 Ala. App. 130, 75 So. 722, certiorari denied 200 Ala. 697, 76 So. 995; *Wanstrath* v. *Kapel*, 190 S. W. 2d 241 (Sup. Ct. Mo.); In *re Martell's Estate*, 276 Mass. 174, 177 N. E. 102; *Walker* v. *Walker*, 155 N. Y. 77, 49 N. E. 663.

[67] See *U. S.* v. *Hooe*, 3 Cranch (U. S.) 73, 78; *Murphy* v. *Boston & M. R. R.*, 77 N. H. 573, 94 Atl. 967; *Hartley* v. *Johnson*, 54 R. I. 477, 175 Atl. 653; *American Locomotive Co.* v. *Hamblen*, 217 Mass. 513, 105 N. E. 371; *People* v. *Foster*, 261 Mich. 247, 246 N. W. 60, 62; *Clugston* v. *Rogers*, 203 Mich. 339, 169 N. W. 9.

the old rules in effect at the time such steps were taken.[68]

The distinction drawn by the Board between the irrelevance of compliance where orders remedy violations of Section 8 (1), (2), (3), and (4) of the Act and the necessity for compliance where orders remedy violations of Section 8 (5) of the Act rests upon the sharp distinction drawn by the Act between the scope of application of Section 9 (f), (g), and (h) to unfair labor practice proceedings and their application to representation proceedings. With respect to unfair labor practices, compliance with Section 9 (f), (g), and (h) is exacted only as a condition precedent to the initial step of issuing a complaint. Contrariwise, in representation proceedings, all steps through certification, including those subsequent to the filing of a petition for certification, are conditioned upon compliance.[69] However, because of the large measure of practical identity between a certification by the Board of a union as the exclusive bargaining representative in a representation proceeding and an order by the Board that an employer bargain collectively with a union as the exclusive bargaining representative in an unfair labor practice proceeding, the Board, in *Matter of Marshall and Bruce Co.*, 75 N. L. R. B.

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[68] *Hawkinson* v. *Carnell & Bradburn*, 26 F. Supp. 150, 152 (D. C. Pa., 1938) (propriety of joinder); *Dolcater* v. *Manufacturers & Traders Trust Co.*, 25 F. Supp. 637, 640 (D. C. N. Y.) (application for intervention); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169–170 (propriety of refusal by circuit court of appeals to entertain suit for costs after expiration of term, when following this refusal, while case on appeal, the new rules, abolishing the term of court limitation were adopted).

[69] *Matter of Rite-Form Corset Company, Inc.*, 75 N. L. R. B. 174.

90, decided as a matter of policy, though not of power, that it should bar to a noncomplying union the use of the Board's processes to the extent that the unfair labor practice involves a refusal to bargain to be remedied by an order to bargain. As stated by the Board, although an unfair labor practice proceeding based on a refusal to bargain "does not involve the actual certification of a bargaining representative, an order requiring an employer to bargain collectively with a labor organization is often tantamount in practice to a certification of the latter as bargaining representative. It looks toward a future relationship" (75 N. L. R. B. at 95–96). The Board concluded, upon consideration of the interrelation between a certification and an order to bargain, that it would not effectuate the policies of the Act to order an employer to bargain with a union which the Board was without power to certify. It stated its rationale as follows (75 N. L. R. B. at 96):

> We are convinced that Section 9 (f), (g), and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections. We cannot believe that Congress intended the full force of Government to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this union has not complied with Section 9 (f), (g), and

> (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that section of the amended Act, within 30 days from the date of the order herein.

As with the Board's treatment of orders remedying violations of Section 8 (1), (2), (3), and (4) of the Act, judicial approval has likewise been extended to the Board's treatment of orders dealing with violations of Section 8 (5) of the Act. The Court of Appeals for the Second Circuit expressly approved the conditioning of that part of the order remedying a refusal to bargain and the unconditional enforcement of the remainder of the order remedying other violations. *N. L. R. B.* v. *Brozen,* 166 F. 2d 812, 813–814 (C. C. A. 2). The Court of Appeals for the Seventh Circuit, in sustaining the constitutionality of Section 9 (h), enforced an order to bargain conditioned upon future compliance with Section 9 (f), (g), and (h), although the complaint was issued prior to the effective date of the amendments. *Inland Steel Co.* v. *N. L. R. B.,* 22 L. R. R. M. 2506, 2507–2508, 2514, 2521 (C. C. A. 7, September 23, 1948). So, too, this Court in *Times Mirror Company* v. *N. L. R. B.,* No. 10123 (C. C. A. 9, May 17, 1948), over objection by the union involved, granted the Board's motion to dismiss without prejudice a petition to adjudge an employer in contempt of a decree enforcing a bargaining order which had been entered prior to the amendment of the Act, where the union which was the beneficiary of the order had failed to comply with Section 9 (f), (g), and (h).

The distinction between orders remedying unfair labor practices under Section 8 (5) and orders remedying other unfair labor practices rests upon the recognition that an order to bargain deals preeminently with the union's continuing representative status. Because in its effect it parallels a certification which requires compliance with Section 9 (f), (g), and (h) at every stage of the Board proceedings, it is appropriate to construe the compliance requirements for an order to bargain and for a certification in *pari materia*. But a remedy for violations of Section 8 (1), (2), (3), or (4) of the Act in an unfair labor practice proceeding contains no counterpart in a representation proceeding.[70] In those instances, the statutory pattern therefore does not contemplate compliance beyond the initial step of determining whether to issue a complaint. The express terms of Section 9 (f), (g), and (h), a fair interpretation of its intendment, considerations of practical administrative procedure which is made correspondingly more difficult to the extent that compliance by a union at more than one determinative stage is exacted, and the pervasive need for assuring to employees the right to uncoerced self-organization, all combine to support the Board's policy of requiring compliance by the labor organization only to determine initially whether a complaint should issue where the violations relate to Section 8 (1), (2), (3), or (4) of the Act.

Accordingly, it is proper that the provisions of the Board's order requiring respondents to bargain with

[70] Orders remedying violations of Section 8 (1), (2), (3), or (4) of the Act, unlike orders remedying violations of Section 8 (5), usually do not grant direct benefits to unions as such.

the C. I. O. be conditioned upon compliance with Section 9 (f), (g), and (h) within thirty days after entry of decree, but that the remaining provisions of the Board's order be unconditionally enforced.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by re-

storing equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[10] (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restaining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant provisions of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * * *

[9] (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular

and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor

organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[SEC. 10] (c) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the

court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11919

National Labor Relations Board, *Petitioner*

v.

O'Keefe and Merritt Manufacturing Company and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, Individually and as Co-Partners, Doing Business as Pioneer Electric Company, *Respondents*

And

United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, Individually and as President of the United Steelworkers of America, C. I. O., *Intervenors*

On Petition for Enforcement With Modifications of an Order of the National Labor Relations Board

BRIEF FOR INTERVENORS

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United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, Individually and as President of the United Steelworkers of America, C. I. O., *Intervenors*

On Petition for Enforcement With Modifications of an Order of the National Labor Relations Board

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BRIEF FOR INTERVENORS

Jurisdiction

This case is before the Court upon petition of the National Labor Relations Board (R. 195–205), pursuant to Section 10 (e) of the National Labor Relations Act, as amended, herein called the Act (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141, *et seq.*), for enforcement with modifications of its order issued against respondents on August 26, 1946, following the usual proceedings under Section 10 of the Act. Respondents are the O'Keefe and Merritt Manufacturing Company, and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as co-partners, doing business as Pioneer Electric Company, all of whom are collectively called the Company.

The jurisdiction of this Court is based upon Section 10 (e) of the Act, the unfair labor practices having occurred at the

Company's plant in Los Angeles, California.[1] The Board's Decision and Order (R. 174-190, 61-119) are reported in 70 N. L. R. B. 771.

STATEMENT OF THE CASE AS IT RELATES TO THE INTERVENTION

Upon the basis of charges and amended charges duly filed by the United Steelworkers of America, Stove Division, Local 1981, C.I.O., the Board issued its second amended complaint dated February 21, 1946, against the Company, alleging that the Company had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act (R. 24-34).

On June 4, 1946, Trial Examiner Henry J. Kent issued his Intermediate Report, finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively upon request with the United Steelworkers of America, Stove Division, Local 1981, C.I.O., as the exclusive representative of the employees in the appropriate bargaining unit (R. 63-117).

On August 26, 1946, the Board issued its Decision and Order, with Board member Reilly dissenting in part, requiring the Company to cease and desist from certain unfair labor practices and to take certain affirmative action, including bargaining collectively upon request with United Steelworkers of America, Stove Division, Local 1981, C.I.O., as the exclusive representative of the employees in the appropriate bargaining unit (R. 174-190).

On August 22, 1947, there became effective certain amendments to the National Labor Relations Act. The amended provisions of the Act include Section 9 (f), (g) and (h) thereof (29 U.S.C.A., sec. 159 (f), (g) and (h)). Section 9 (h) provides as follows: [2]

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[1] In the conduct of its business the Company makes substantial sales in interstate commerce (R. 69-72; R. 1056, 1268). Jurisdiction is not contested (*ibid.*, R. 321).

[2] Section 9 (c), referred to in Section 9 (h), is the section in the Act providing for the holding of elections by the Board upon petition by labor organizations, individuals, employees, groups of employees and employers.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

Section 9 (f) and (g), which are not directly involved in this case, impose upon labor organizations certain obligations, subject to the same sanctions as are imposed by Section 9 (h), to file information with the Secretary of Labor relating to the finances of labor organizations, their internal affairs and structure.

Thereafter, the Board filed in this Court a petition for enforcement, with modifications, of its Order, dated May 28, 1948. Among other modifications requested is included a request to this Court to condition enforcement of the bargaining portions of the Order upon compliance with Section 9 (f), (g) and (h) of the Act within thirty (30) days from the date of the decree enforcing the Order (R. 195-205).

On August 5, 1948, the United Steelworkers of America, Stove Division, Local 1981, C.I.O., and Philip Murray, Indi-

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Section 9 (e), referred to in Section 9 (h), provides for the holding of an election for the purpose of determining whether a majority of the employees authorize the bargaining agent to negotiate an agreement with the employer making union membership a condition of employment. In the absence of such an authorization, the negotiation of such an agreement is made illegal by Section 8 (b) (1) of the Act; cf. Section 8 (a) (3).

Section 10 (b), referred to in Section 9 (h), is the provision of the Act authorizing the Board to issue complaints that unfair labor practices have been committed.

vidually and as President of the United Steelworkers of America, C.I.O., herein called the Union, filed in this Court a Motion to Intervene in which it recited that the United Steelworkers of America had complied with Section 9 (f) and (g) of the Act and that Local 1981 would comply with said sections within thirty (30) days from any decree of this Court. The Union further recited in its Motion that neither the officers of the United Steelworkers of America nor of Local 1981 would comply with the requirements of Section 9 (h) of the Act for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void and that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The Union therefore prayed that it be permitted to intervene for the purpose of urging that Section 9 (h) of the Act is unconstitutional and void and that the Court enforce the Board's Order without any modification requiring compliance with said Section 9 (h) (R. 1763-1777). The Court thereupon entered an Order allowing intervention (R. 1778).

STATEMENT OF POINTS RELIED ON

1. Freedom of belief cannot be restricted.

   West Virginia v. *Barnette,* 319 U.S. 624, 634, 642; *DeJonge* v. *Oregon,* 299 U.S. 353; *Stromberg* v. *California,* 282 U.S. 359; *Whitney* v. *California,* 274 U.S. 357, 375; *Gitlow* v. *New York,* 268 U.S. 652, 672, dissenting opinions of Justices Holmes and Brandeis.

2. Utterances in advocacy of belief or opinion are immune from legislative limitation no matter how unpopular they may be or how non-conformist a philosophy they may express.

   Herndon v. *Lowry,* 301 U.S. 242; *Thornhill* v. *Alabama,* 310 U.S. 88; *Bridges* v. *California,* 314 U.S. 252; *Schneider* v. *New Jersey,* 308 U.S. 147; *Lovell* v. *City of Griffin,* 303 U.S. 444.

3. Political rights of discussion and affiliation involve in addition constitutional rights of freedom of assembly, association and speech which are protected by the First Amendment.

DeJonge v. *Oregon,* 299 U.S. 353, 365; *Whitney* v. *California,* 274 U.S. 357, 375; *Stromberg* v. *California,* 282 U.S. 359, 369.

4. Political rights are cloaked with the protection of the Ninth and Tenth Amendments as well as the First.

   United Public Workers v. *Mitchell,* 330 U.S. 75, 94.

5. The fundamental purpose of protecting civil rights is to insure political freedom, and to make the government responsive to the will of the people. Political rights must receive the fullest judicial protection under the First Amendment.

   DeJonge v. *Oregon,* 299 U.S. 353, 365; *Whitney* v. *California,* 274 U.S. 357, 375; *Stromberg* v. *California,* 282 U.S. 359, 369.

6. Expurgatory oaths as to political belief are banned by the First, Ninth and Tenth Amendments.

   West Virginia v. *Barnette,* 319 U.S. 624; *Cummings* v. *Missouri,* 4 Wall. 277; *DeJonge* v. *Oregon,* 299 U.S. 353; *Ex parte Garland,* 4 Wall. 333, 380; *United Public Workers* v. *Mitchell,* 330 U.S. 75.

7. A statute purporting to restrict freedom of speech, press and assembly which is vague and indefinite, is void on its face.

   Winters v. *New York,* 333 U.S. 507; *Stromberg* v. *California,* 282 U.S. 359, 369; *Herndon* v. *Lowry,* 301 U.S. 242, 258; *Thomas* v. *Collins,* 323 U.S. 516, 535; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Near* v. *Minnesota,* 283 U.S. 697; *Grosjean* v. *American Press Co.,* 297 U.S. 233, 251.

8. In prosecutions under Section 35-A of the Criminal Code (18, U.S.C.A., sec. 80), the constitutionality of the statute in connection with which a false statement was made to the government is considered collateral to the crime charged and cannot be challenged.

   Kay v. *United States,* 303 U.S. 1, 6; *United States* v. *Barra* (C.C.A. 2), 149 F. (2d) 489; *United States* v. *Presser* (C.C.A. 2), 99 F. (2d) 819.

9. The authority to enact any statute which constitutes a bill of attainder is expressly excluded by the Constitution

from the delegation of legislative powers to Congress.

Art. 1, Sec. 9, cl. 3—Constitution.

10. A bill of attainder is a legislative act which usurps the judicial function by making a legislative declaration of guilt.

U.S. v. *Lovett,* 328 U.S. 303; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

11. Exclusion from a vocation is a form of punishment within the definition of a bill of attainder.

U.S. v. *Lovett,* 328 U.S. 303, 315, 316; *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333.

12. A description of organizations in general terms, which serves to identify a proscribed group is within the definition of a bill of attainder.

U.S. v. *Lovett,* 328 U.S. 303, 315, 316, *Cummings* v. *Missouri,* 4 Wall. 277.

13. A legislative declaration of guilt which is contained in a bill of attainder is *a fortiori* a violation of the due process clause of the Fifth Amendment.

Frankfurter, J. in *U. S.* v. *Lovett,* 328 U.S. 303, 321.

14. The doctrine of personal guilt is at the very essence of the concept of freedom and due process of law.

Bridges v. *Wixon,* 326 U.S. 135, 161, 163; *Schneiderman* v. *U. S.,* 320 U.S. 118, 136.

15. Discriminatory legislative action which as arbitrary and injurious violates the Fifth Amendment.

Nichols v. *Coolidge,* 274 U.S. 531; *Wallace* v. *Currin,* 95 F. (2d) 856, 867 (C.C.A. 4), affirmed 306 U.S. 1; *Minski* v. *U.S.,* 131 F. (2d) 614, 617 (C.C.A. 6); *U.S.* v. *Ballard,* 12 F. Supp. 321, 325-326 (W.D. Ky.); *U.S.* v. *Yount,* 267 Fed. 861, 863; *U.S.* v. *Lovett,* 328 U.S. 303.

16. The right of workingmen to organize and to bargain collectively and the day to day functioning of labor organizations involve constitutional rights of speech, press and assembly.

N.L.R.B. v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33, 34; *Thomas* v. *Collins,* 323 U.S. 516; *Texas and New Orleans Railroad Co.* v. *Railway and Steamship Clerks,* 281 U.S. 548; *Hague* v. *CIO,* 507 U.S. 496; *Thornhill* v. *Alabama,* 310 U.S. 88

17. The choice of labor union officers by the members is an exercise of constitutional rights of free speech and free assembly.

    Thomas v. *Collins,* 323 U.S. 516, 546.

18. Legislative action which effects a change in existing law is subject to judgment for consistency with constitutional guarantees, whether or not the effect of the action was to remove a preexisting right or remedy.

    Truax v.*Corrigan,* 257 U.S. 312; *Senn* v. *Tile Layers' Union,* 301 U.S. 468.

19. Denial of government services and facilities must be in accord with constitutional guarantees

    Frost v. *Railroad Commission,* 271 U.S. 583, 593; *U.S.* v. *Schneider,* 45 F. Supp. 848 (E.D. Wisc. 1942); *Danskin* v. *San Diego Unified School Dist.,* 28 Cal. (2d) 536, 171 P. (2d) 886; *Hannegan* v. *Esquire,* 327 U.S. 146, 156; Mr. Justice Brandeis, dissenting in *United States ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson,* 255 U.S. 407, 429-434.

20. In First Amendment cases, it is the character of the right, not of the limitation, which determines what standards govern the determination of validity.

    Thomas v. *Collins,* 323 U.S. 516, 530.

21. The burden of sustaining the constitutionality of legislation abridging rights guaranteed by the First Amendment is upon the government.

    West Virginia v. *Barnette,* 319 U.S. 624, 639; *Thomas* v. *Collins,* 323 U.S. 516, 529-530; *Schneider* v. *New Jersey,* 308 U.S. 147; *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102; *Bridges* v. *California,* 314 U.S. 252, 262-263; *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153; *Marsh* v. *Alabama,* 326 U.S. 501, 509.

22. A statute in the civil rights area must be narrowly drawn to deal with the precise evil which the legislature is seeking to curb.

    Schneider v. *New Jersey,* 308 U.S. 147; *Cantwell* v. *Connecticut,* 310 U.S. 296; *DeJonge* v. *Oregon,* 299 U.S. 353.

23. Even where a statute deals only with advocacy or expression and meets other appropriate constitutional standards, it will not survive the Constitution unless the substantive end sought is the protection of a paramount and substantial interest and unless the activity regulated constitutes a clear and immediate danger to that interest.

Thomas v. *Collins,* 323 U.S. 516, 530; *Bridges* v. *California,* 314 U.S. 252, 253.

SUMMARY OF ARGUMENT

The expurgatory oath requirement of Section 9 (h) is directed primarily, if not exclusively, at political belief or opinion.

Its legislative history reveals that the section was a result of a deliberate attempt to impose sanctions on opinion and belief. Portions of Section 9 (h) important to a determination of the issues in this case, such as the provision as to expurgatory oaths and the provision as to initiation of complaints of unfair labor practices under Section 10 (b), were inserted into the bill for the first time in conference and received little or no consideration. The categories set up in Section 9 (h) were described by the sponsors of the section in such dangerously loose phraseology as "Communists or subversive officers," "unions whose officers are Communists or follow the party line," "Communists and fellow travelers," "front organizations," and "party line officers."

Section 9 (h) attempts a restriction on freedom of expression and political opinion which is so extreme that its parallel cannot be found in the facts of any of the recorded cases which constitute our civil liberties jurisprudence. It is characterized by an interference with freedom of *belief* and *opinion,* and by resort to an expurgatory oath.

Freedom of belief cannot be abridged. Our courts have consistently frowned upon any legislation which even approaches such abridgment.

Political freedom involves constitutional rights of freedom of assembly and freedom of association. Limitation of such rights violates the First Amendment.

The right to engage in political activity is a basic right re-

served to the people and protected by the Ninth and Tenth Amendments. Section 9 (h) also contravenes the guarantees of the Ninth and Tenth Amendments. Judicial interference is peculiarly called for because restraints involved occur in the political arena; the fundamental purpose of protecting civil rights is to insure political freedom.

Labor is importantly involved in political action in order to protect the rights of workingmen and to improve their conditions. Leaders of modern labor organizations are necessarily participants in the political life of the country and express the political views of the members of the labor organizations of which they are officers. Abridgment of the political rights of such officers is in consequence an abridgment of the political rights of the members of the labor organizations.

The expurgatory oath is a device historically used to exact conformity and to control thought. It has no warrant in the Constitution and is beyond federal power.

The categories set up in Section 9 (h) are so vague and indefinite as to conflict with the First Amendment. The reasons for the rigid constitutional requirement of definiteness in any such restrictive statute are, first, that the absence of adequate notice as to a proscribed activity acts as an effective previous general restraint and paralyzes freedom of expression, and, second, that vagueness of a statute infringing civil rights lays the basis for discriminatory and unfair application, especially where minority groups are concerned.

These reasons have particular reference to the activities of a labor organization, its members and officers. Charges of "subversion" are common in industrial relations situations. Previous charges, made in the course of industrial disputes as to the inclusion of petitioners in the categories proscribed by the statute, bear evidence that the reasons for the requirement of definiteness also have peculiar application to the petitioners in this case.

The categories which Section 9 (h) attempts to set up and the descriptive phrases used in connection with these categories are vague and indefinite and must fall before the Fifth Amendment.

Section 9 (h) is a bill of attainder and is therefore a use of

power which the Constitution unequivocally declares Congress can never exercise. Section 9 (h) proceeds not by way of defining a harmful activity and setting up sanctions against such activity, but by way of a legislative declaration of the guilt of individuals and groups with respect to engaging in such activities.

Section 9 (h) when considered in each of its aspects and when considered as a whole, violates those concepts of fair dealing and of the protection of the individual against abuses by government which are the bases of the constitutional guarantees. Section 9 (h) violates all due process requirements. Section 9 (h) is a bill of attainder and is *a fortiori* in violation of the Fifth Amendment. Section 9 (h) does violence to the doctrine of personal guilt and is therefore a violation of the Fifth Amendment. Section 9 (h) sets up arbitrary classifications in that it does not apply the same rules to the employers with whom the labor organizations deal in the industrial relations scene and is therefore a violation of the Fifth Amendment. Section 9 (h) utilizes an expurgatory oath and is therefore in violation of the Fifth Amendment.

The method of enforcing Section 9 (h) emphasizes its unconstitutionality. To avoid the obstacles which stand in the way of direct sanctions, Section 9 (h) threatens the destruction of a labor organization in order to coerce it to surrender the right to elect officers of its own choice and to compel it to oust officers who refuse to submit to invasion of basic liberties.

By denying the right to bargain with the employer on a basic issue and by imposing disabilities upon non-conforming unions which are refused Board certification, and in other ways, Section 9 (h) interferes with the fundamental right to bargain collectively. Since collective bargaining is the prime purpose of labor organizations, the right of self-organization and the right to engage in concerted activities are also abridged. These rights are civil rights protected by the First Amendment.

The full impact of Section 9 (h) upon non-conforming organizations such as petitioner labor organization, is to impair collective bargaining, to imperil its representative status in plants in which it has functioned for years, to promote the

selection of unrepresentative bargaining agents, to encourage industrial unrest, to invite repudiation of the bargaining relationship, to make futile and meaningless the organizing process and to make illegal the exercise of traditionally sanctioned concerted activities. This deprives petitioning labor organization and its members of basic constitutional rights.

The device chosen to effectuate the purpose of the statute is a deliberate interference with the freedom of labor union members to choose their own officers. The right to assembly obviously includes the right to members of an organization freely to elect their own officers and the right of free speech. Section 9 (h) is therefore an abridgment of the rights of members of labor organizations to free speech and to assembly. The method of enforcement of Section 9 (h), that of inducing third parties to exert sanctions against labor union officers which limit such officers in their freedom of political belief and in their freedom of political activity, violates the Constitution.

The withdrawal of use of government facilities which over the course of the years have become an essential to the life of labor unions, and which have become an integral part of industrial relations practices, is not a mere withdrawal of a benefit. It is a change in substantive law which must be viewed in light of constitutional tests. However, even if verbalized as a grant of a benefit upon condition, the statute cannot avoid judgment upon the basis of the Constitution. It is the character of the right involved and not the character of the restriction which governs the constitutional standards to be applied.

The burden of establishing that Section 9 (h) is constitutional is upon the Board, since the case involves rights guaranteed by the First Amendment. This rule must be observed more rigidly because the case involves political rights.

Section 9 (h) cannot possibly meet the requisite constitutional tests.

The statute is not narrowly drawn but invades the civil rights of those with whom the legislation is not primarily concerned, and imposes blanket obligations on whole classes of individuals.

The vagueness of Section 9 (h) condemns it under the Fifth

Amendment, and even more certainly under the First Amendment.

There is no constitutional justification for any invasion of freedom of belief. Insofar as Section 9 (h) limits other freedoms guaranteed by the First Amendment, the Board cannot possibly meet the requirement that the activities regulated must constitute a close and immediate threat to a substantial interest which the State may protect.

ARGUMENT

Preliminary Statement

This case presents to the Court an issue of transcendent importance. That issue is whether a federal statute which calls for expurgatory affidavits from union officers as to their political belief is constitutional. The statute, in its operation, abridges the political rights of union officers and union members and, with respect to labor organizations whose officers have not filed affidavits with the Board, limits and restricts their rights to engage in concerted activities and to bargain collectively. It is the contention of the Union that the statute abridges freedom of speech, press and assembly and thereby contravenes the First, Fifth, Ninth and Tenth Amendments.

The federal statute involved is the Labor-Management Relations Act, 1947 (29 U.S.C.A., sec. 141 *et. seq.)* The 1947 Act is a comprehensive scheme of regulation of the process of self-organization and collective bargaining. A principal characteristic of the statute is that it thrusts the Federal Government into the collective bargaining process to a greater extent than ever before.

This case is concerned with that portion of the 1947 Act, Section 9 (h), which presents the Union, the members and officers with alternatives. Their choice is to have the Union officers file expurgatory affidavits as to their political beliefs and opinions or to be subjected, first, to the imposition of certain severe restrictions and burdens to which other labor organizations are not subject, and, second, to the release of the employers with whom they deal from certain regulations to which employers who deal with other labor organizations must conform.

It is our contention that the first alternative, that of the expurgatory affidavit, is an unconstitutional interference with the freedom of speech and assembly of petitioner Philip Murray and of other labor union leaders. It is our contention further that these unconstitutional restraints peculiarly call for judicial intervention because they occur in connection with political beliefs and opinions. The statute burdens the exercise of civil rights precisely in that area where such exercise is most vital to the preservation of a democratic society.

A limitation upon the political conscience of a union officer is by the same token a limitation upon the political rights of the members of the union for whom the officer is a spokesman and representative in the affairs of the Nation. Such limitation upon political rights and expression have no warrant in the Constitution.

In the case of Section 9 (h) these limitations upon the political rights of union officers and of union members are particularly indefensible.

Section 9 (h) rests its requirements upon a legislative finding of guilt of individuals and of groups in engaging in activity deemed harmful, and is therefore a bill of attainder, excluded, by express provision in the Constitution, from the powers delegated to the Congress.

This section defines the individuals and groups as to whom this legislative finding is made in terms so vague and indefinite as to afford no security to freedom of political belief and discussion. The definitions give no adequate notice of the proscribed political belief or expression and so broadly interfere with political belief and expression.

Section 9 (h) ignores the constitutional requirement that legislation abridging civil rights must be narrowly drawn. The statute is directed at opinions and beliefs rather than at the conduct which is claimed to flow from such opinions and beliefs. Moreover, the reach of the statute is such as to abridge not only the civil rights of officers of labor organizations, but also the civil rights of members of labor organizations.

The Board has contended that the presence of the secon alternative cures the constitutional infirmities of the first. It

is our view that the second alternative intensifies these infirmities. The second alternative is the sanction for not choosing the first. It is a sanction which is equivalent to the outlawing of the labor union from the arena of organization and collective bargaining. And, as we have already indicated, the impact of these sanctions creates independent grounds for constitutional objection, for the statute so drastically impairs the right to organize and to bargain collectively as to constitute an abridgment of the right of union members to engage in the constitutionally protected activities of free speech and assembly necessarily involved in the organizing process.

Section 9 (h) also poses to the Court the issue of whether Congress may attempt to apply sanctions for activity deemed harmful by way of creating inducements to third parties. From another aspect this question is whether Congress may constitutionally interfere in the internal affairs of labor organizations by creating inducements and pressures of the type here involved upon labor union members to select officers holding government-approved political views.

I.

SECTION 9 (h) INVADES THE POLITICAL FREEDOM OF PETITIONER PHILIP MURRAY AND OF THE MEMBERS OF PETITIONING LABOR ORGANIZATION IN VIOLATION OF THE FIRST, NINTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. *The statute and its background*

The statute here under review imposes upon officers of labor organizations the obligation to file an affidavit disclaiming certain proscribed types of political belief and affiliation and imposes certain sanctions upon the labor organization involved in the event of a failure to file the required affidavit. An examination of the affidavit requirement reveals that it is directed primarily, if not exclusively, at political belief or opinion. The officer filing the affidavit must swear:

1. That he is not a member of the Communist Party
2. That he is not affiliated with such party, and

3. That he does not believe in and "is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The only language in the affidavit which might conceivably deal with something more than mere opinion or belief is a phrase stating that the officer must swear that he does not "support" the organization proscribed in the statute. To the extent that this word imports more than belief or opinion, it constitutes an exception to the remainder of the affidavit requirement.

The forerunner of Section 9 (h) was Section 9 (f)(6) of H. R. 3020, introduced in the House of Representatives on April 10, 1947, by Congressman Hartley of New Jersey. That Section read:

> "(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings, and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

It will be observed that no provision appeared as to an expurgatory oath or as to a bar to non-conforming labor organizations to initiate charges of employer unfair labor practices under Section 10 (b).

We think it accurate to say that the legislative history of the bill on the House side reveals a clear and deliberate attempt to impose sanctions upon opinion and belief. See 93 *Cong. Rec.* 3533, 3535, April 11, 1947; 93 *Cong. Rec.* 3577, 3578, April 16, 1947; H. Rep. No. 245 (80th Cong., 1st Sess.), April 11, 1947.

In the original Senate bill—S. 1126, introduced by Senator Taft of Ohio on April 17, 1947—no provisions similar to those

now found in Section 9 (h) were included. The section 9 (h) provisions were incorporated into the Senate bill by way of an amendment sponsored by Senator McClellan of Arkansas, who asked that Section 9 (f) (6) of the House bill be included in the Senate version.

Thus, as the bill went to conference, there was no provision as to initiation of charges of unfair labor practices under Section 10 (b) and no provision for expurgatory oaths. In conference, both provisions were added.

The conference report (*H. Rep. No. 510,* 80th Congress, 1st Session, June 3, 1947), simply recites the provisions of Section 9 (h), as revised by the conference group. Debate on these new provisions appears to have been limited to a point of order in the House, raised unsuccessfully by Congressman Hoffman of Michigan, to the effect that in adding the bar to initiation of charges of employer unfair labor practices under Section 10 (b), the conference group was incorporating new material, and a subsequent remark by Congressman Hartley to the effect that:

> "The bill further prohibits labor organizations from invoking the processes of the act unless all of the officers file affidavits with the board that they are not members of the Communist Party or other subversive organizations." (93 *Cong. Rec.* 882, June 4, 1947.)

The Senate does not appear to have discussed the inclusion of the 10 (b) provision. On the matter of the expurgatory oath, mention was made of it in a summary of the difference between the Senate and conference versions which Senator Taft placed in the Congressional Record, and in a statement by Senator Taft on the floor of Congress in which he said:

> "MR. TAFT. Yes. There is nothing new. We changed the provision regarding Communist officers. The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. Otherwise, the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as

> to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill. But there is no provision as to that subject that was not in one bill or the other." 93 *Cong. Rec.* 6604, June 6, 1947.

Congressional debate on the contents of the proscribed categories in Section 9 (h) appears to have been limited to the issue of whether the word "is" or the words "ever has been" should be used with respect to members and affiliates of the Communist Party. No definitions of the categories were attempted. But the use of dangerously loose phraseology, so frequent in the political arena in these times, indicated the conceptions of the proscribed categories which were prevalent. For example, we may observe these phrases: (1) "Communists or subversive officers" (*H. Rep. No. 245, supra,* p. 5); (2) "unions whose officers are Communists or follow the party line" (*H. Rep. No. 245, supra,* p. 10); (3) "Communists and fellow travellers" (*H. Rep. No. 245, supra,* p. 10, 93 *Cong. Rec.* 3577); (4) "Front organizations" (*H. Rep. No. 245, supra,* p. 39); and (5) "party-line officers" (93 *Cong. Rec.* 3577).

B. ***Section 9 (h) on its face violates basic freedoms.***

Section 9 (h) is a product of a growing attack upon civil liberties that is an exaggerated counterpart of the invasion of civil rights which occurred after the first World War. Today the traditional barriers against invasion of freedom of belief, freedom of conscience and freedom of speech, press and assembly are being subjected to pressures in almost every field. See O'Brian, *"Loyalty Tests and Guilt by Association,"* 61 Harv. L. Rev. 592; *In Times of Challenge, U. S. Liberties, 1946-47,* American Civil Liberties Union; Gellhorn, *"A Report on a Report of the House Committee on Un-American Activities,"* 60 Harv. L. Rev. 1193; Chafee, *Letter to Honorable Alexander Wiley,* 94 Cong. Rec., No. 104, A. 3848, June 9, 1948; Wyzanski, *"The Open Window and the*

Open Door," 35 Calif. L. Rev. 336; *"Letter to the President by Members of Yale Faculty of Law,"* 4 A.B.A.J. 15, 16; Andrews, *Washington Witch Hunt* (1948).

Section 9 (h) is a direct assault upon the rights of officers of labor organizations and of members of such organizations to freedom of expression and freedom of political activity. As such, it transcends federal powers. But Section 9 (h) is more than that. It is an attempt at a restriction upon these freedoms which is so extreme that its parallel cannot be found in the facts of any of the recorded cases which constitute our civil liberties jurisprudence. See, for example, *Abrams* v. *U. S.*, 250 U.S. 616; *Cantwell* v. *Connecticut,* 310 U.S. 296; *DeJonge* v. *Oregon,* 299 U. S. 353; *Hague* v. *C.I.O.,* 307 U. S. 496; *Herndon* v. *Lowry,* 301 U. S. 242; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Schneider* v. *New Jersey,* 308 U. S. 147; *Stromberg* v. *California,* 282 U. S. 359; *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia* v. *Barnette,* 319 U. S. 624; *Winters* v. *New York,* 333 U. S. 507; *Whitney* v. *California,* 274 U. S. 357.

Two characteristics serve to distinguish Section 9 (h) from other statutory attempts to regulate freedom of expression.

1. Section 9 (h) interferes with freedom of *belief* and *opinion*;

2. Section 9 (h) resorts to an expurgatory oath, a device historically used to exact conformity and to control thought.

1. We cannot overemphasize the fact that the present case involves freedom of belief and opinion. Freedom of political belief is a fundamental right guaranteed to the people by the Constitution. It is not merely the means for promoting that belief which fall within the guarantees of the Bill of Rights. Rather, political belief itself, the free right to hold opinions is a basic right of the American people. It is this right which defines the character of our government and the rights of freedom of speech, press and assembly are guaranteed so that this right to political freedom shall be furthered and shall not be destroyed by arbitrary official action. Our courts have consistently frowned upon any legislative action which even approaches interference with opinion or belief. Thus in *West Virginia* v. *Barnette, supra,* the Supreme Court

struck down as invalid an enforced avowal of belief. The Court pointed out (pp. 634, 642):

> "Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.
>
> * * *
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

See, also, *Stromberg* v. *California, supra; Gitlow* v. *New York,* 268 U. S., 652, 672, dissenting opinions of Justices Holmes and Brandeis, *DeJonge* v. *Oregon, supra.*

Moreover, it should be pointed out that the restraint here involved is wholly in the realm of ideas or principles. For this is not a case in which a statutory duty to engage in certain generally prescribed conduct is violated because of a claimed conscientious belief or scruple. Compare *In re Summers,* 325 U. S. 561 and *Prince* v. *Massachusetts,* 321 U. S. 158.

In addition, this is not a case in which a fundamental right has incidentally fallen victim to a broad regulatory statute directed to other ends. There is more involved in this case than a regulatory measure which happens, in its application, to collide with an asserted constitutional right. We are not here confronted with a tax measure (*Jones* v. *City of Opelika,* 319 U. S. 103), or a regulation dealing with breach of the peace (*Cantwell* v. *Connecticut,* 310 U. S. 296), or a licensing measure (*Schneider* v. *New Jersey,* 308 U. S. 147), the enforcement of which in a particular situation burdens the exercise of constitutional rights. The Supreme Court has been vigilant in preserving rights against abridgment in this manner. However, in this case, Congress passed a statute which expressly and on its face attacks political opinion and belief. And, of course, by the same token, it specifically attacks the political opinions and beliefs of a particular identified group,

namely, officers of labor organizations. See *Matter of Northern Virginia Broadcasters, Inc.*, 74 N.L.R.B. No. 2, 20 LRRM 1319.

Section 9 (h) is a shocking and profoundly offensive measure because it imposes sanctions for the alleged evil of harboring "dangerous thoughts." See, Barnett, *"The Constitutionality of the Expurgatory-Oath Requirement of the Labor-Management Relations Act of 1947,"* 27 Oreg. L. Rev. 85, 93. Because Section 9 (h) goes far beyond punishment for advocacy of doctrines claimed to threaten the dominant interests of the state and is concerned primarily with opinion, it requires the forthright condemnation of this Court.

Even when what is involved are utterances in advocacy of belief or opinion, there is an impassable constitutional barrier which protects such utterances no matter how unpopular they may be or how non-conformist a philosophy they may express. See *Herndon* v. *Lowry, supra; Lovell* v. *Griffin, supra; Schneider* v. *New Jersey, supra; Thornhill* v. *Alabama, supra; Bridges* v. *California,* 314 U. S. 252.

Moreover, judicial intervention against the restraints of Section 9 (h) is peculiarly called for because the restraints involved occur in the political arena. The fundamental purpose of protecting civil rights is to insure political freedom.[3] As Justice Brandeis stated in *Whitney* v. *California, supra* (p. 375):

> "Those who won our independence . . . recognized the risks to which all human institutions are subject. But they knew that *order cannot be secured merely through fear of punishment for its infraction;* that it is haz-

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[3] And it was viewed in that very light from the beginnings of our form of government. Madison, in his report on the Virginia Resolutions directed against the Alien and Sedition laws of 1808 stated:

"Of this act it is affirmed—1. That it exercises, in like manner, a power not delegated by the Constitution; 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3. That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of freely communicating thereon, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 561.

> ardous to discourage thought, hope and imagination; that fear breeds repression; *that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.*" (Italics supplied.)

In *Stromberg* v. *California, supra* (p. 369), Chief Justice Hughes held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

In *DeJonge* v. *Oregon, supra* (p. 365), the Court adverted to the "imperative" need "to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Political affiliation necessarily involves constitutional rights of freedom of assembly and freedom of association. Section 9 (h) impairs the right of leaders of labor organizations to form, join or collaborate with organizations of a political nature. Cf. *DeJonge* v. *Oregon, supra.*

The fact that the statute impairs basic rights of political freedom brings into play the Ninth and Tenth Amendments which are, equally with the First Amendment, a part of the Bill of Rights. These Amendments state specifically: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" (Amendment IX) and reserve "to the people" the powers not delegated to the Federal Government (Amendment X).

While the Tenth Amendment has frequently been relied on in attempts to defeat the exercise of federal regulation on the ground that no power has been granted to the federal government by the Constitution to encompass the regulation in ques-

tion and that the rights of the states have been infringed, the present case involves not the rights of the states as against the exercise of federal power but rights reserved to the people which are equally protected by the Constitution against both state and federal action. The Supreme Court has recognized in *United Public Workers* v. *Mitchell,* 330 U. S. 75, that the right to engage in political activity is a basic right protected by the Ninth and Tenth Amendments. The Court there stated (at p. 94):

> "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved."

The fact that the statute limits the constitutional rights of officers of labor organizations is scarcely a consideration in its mitigation. Petitioners include among their important activities, political activity. Just as individual workingmen must act in concert if they are to further their economic interests, so they must express their political views through the spokesmen for their group if they are to exercise their political freedom effectively. As one writer has put it:

> "*Labor has always been in politics.*
>
> "It is difficult to conceive of any functioning labor organization which does not take part in politics. For the leaders of labor, politics was, and is, the other side of the trade-union coin.
>
> "Every labor organization is, in principle, dedicated to the protection of the rights of its members and to the improvement of their conditions. If these objectives are to be attained, labor must ask for legislation of many kinds. Whether a union succeeds or fails in getting its demands depends entirely upon whether the legislators are for labor or against labor. In turn, very naturally, labor supports those legislators friendly to labor, and repudiates those who are anti-labor.
>
> "It has always been so.
>
> "As far back as 1886, Samuel Gompers said: 'We regard with pleasure the recent political action of organized workingmen of this country, and by which they have demonstrated that they are determined to exhibit their

political power.'" Joseph Gaer, *"The First Round"*, (1944), p. 49.[4]

With the increased participation of government in our economic life, workers are forced into politics through their unions in order to preserve their economic security and standard of living. If an individual is helpless in dealing with his employer, then how can it be said that he is more able to deal with the powerful employer-dominated political interests which, unless restrained, can decisively fix or alter the terms and conditions under which he must live? In sheer self-protection he must associate with others in order to preserve those political values which enforce and promote his economic interests. He must organize politically in order to defend against political attack the gains achieved through his economic strength. He must organize politically in order to meet the organized political attack of other interests in our national life. And he must organize politically in order to safeguard and

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[4] The best available account of the forces which have stimulated labor's political activities is Taft, *Labor's Changing Political Line*, 43 Journal of Pol. Ec. 634 (1937).

The following texts document the historic role of labor in American political life:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33–46, 54–61, 80–85, 103–112, 165–171; Bimba, *The History of the American Working Class* (1927), pp. 84–89, 204–208, 323–330; Carroll, *Labor and Politics* (1923), pp. 27–54, 80–138; Childs, *Labor and Capital in National Politics* (1930), Commons and Associates, *History of Labor in the United States*, vols. I and II (1918), Vol. I, pp. 169–335, 369, 454–471, 522, 535, 548–559; Vol. II, pp. 85–109, 124–130, 138–146, 153–155, 168–171, 240–251, 324, 341–342, 351–353, 461–470, 488–493; Daugherty, *Labor Problems in American Industry* (1933) pp. 622–629; Foner, *Labor Movement in the United States* (1947), pp. 104–105, 130–134, 140, 149–166, 210–217, 245–248, 262–263, 334–336, 357–359, 372–373, 423–429, 475; Harris, *American Labor* (1938), pp. 33–55, 65–69; Hoxie, *Trade Unionism in the United States* (1917), pp. 78–102; Lorwin, *The American Federation of Labor* (1933), pp. 88–93, 123–126, 221–226, 351, 397–425; Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54–55, 57n, 62, 67, 71, 81, 91, 108–111, 118, 123–129, 141, 143, 149, 178, 181–188, 232–238, 303–305, 311, 313, 317–320, 348–349, 600, 669, 829, 890; Perlman, *A History of Trade Unionism in the United States* (1929), pp. 146–160, 285–294; Perlman and Taft, *History of Labor in the United States, 1896–1932* (1935), pp. 150–166, 525–537; Schlesinger, *The Age of Jackson* (1945), pp. 132–158, 180–185; Walsh, *C. I. O., Industrial Unionism in Action* (1937), pp. 248–271; Ware, *The Labor Movement in the United States, 1860–1895* (1929), pp. 350–370; Ware, *The Industrial Worker, 1840–1860* (1924), pp. 154–162.

promote his right to form and join unions and his right to bargain collectively and to strike.[5]

Leaders of modern labor organizations are necessarily participants in the political life of their local community, of their State, and of the Nation. They express the political views of their organizations. They consult with and are consulted by other organizations and individuals. They lend support to joint projects and they ally themselves with others to induce the passage of legislation and to achieve other political goals. They participate in political planning and election campaigns. They take part in government administration and in the shaping of government policy, is in the case of the tripartite National War Labor Board and National Wage Stabilization Board, in which labor leaders represented the Labor point of view. And they exert an influence in political affairs commensurate with the size of the labor organizations which they head.

Members of labor organizations, aware of the important role of their union in political life, are influenced in their choice of union officers by the political views and beliefs of the candidates. A statute which impairs the policial rights of a labor union officer is an effective interference with the freedoms of speech, press and assembly of those who elected him. Compare, *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209.[6]

2. The objections to Section 9 (h) are intensified rather than mitigated by the fact that it is implemented by the requirement of an expurgatory oath. The expurgatory oath as a safeguard of conformity has been historically condemned because of its obvious repugnance to freedom of conscience. See, for example, *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, 380. Here, as the Supreme Court said in *Cummings* v. *Missouri, supra* (p. 318), "The oath is directed not merely against overt and visible acts of

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[5] One of the most powerful factors which brought labor into political life was the evil of "Government by Injunction." Lorwin, The American Federation of Labor (1933), pp. 88, 90.

[6] We discuss subsequently the contention that the sanctions of the statute improperly interfere with the rights of the union members to elect officers of their own choosing.

hostility to the government, but is intended to reach words, desires, and sympathies also."

The requirement that those subject to the statute swear an oath with respect to their beliefs subject to the penalties for perjury is profoundly inconsistent with democratic guarantees.[7]

II.

THE VAGUENESS OF SECTION 9 (h) CONDEMNS IT AS UNCONSTITUTIONAL.

Section 9 (h) requires a sworn avowal from each officer of a labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit, that "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, or is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." It is submitted that these categories are so vague and indefinite as to conflict with the First Amendment.

Only one phrase apears to be a precise guide, "member of the Communist Party." The words "affiliated with," "believe in," "supports (an) organization" and "unconstitutional methods" (as opposed to force) do not give notice of exactly what are the proscribed beliefs or activities and what is the proscribed degree of involvement. Intensive judicial consideration of the meaning of these phrases in particular contexts attests to the difficulties which face an active labor union leader in understanding the precise conduct, or "belief" about which he must swear his innocence.

The Supreme Court has recently pointed out in *Winters* v. *New York, supra* (pp. 509-510):

"The appellant contends that the subsection violates the

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[7] As one writer has put it, the statute involves "a kind of resurrection of the old Inquisition, through which heretics were burned alive because of beliefs or disbeliefs that they were forced to reveal. The act is reminiscent also of the law of 'Merry Old England' under which a man might be hanged, drawn, and quartered for merely 'imagining' the death of the King." Barnett, *"The Constitutionality of the Expurgatory-Oath Requirement of the Labor Management Relations Act of 1947,"* 27 Ore. L. Rev. 85, 93.

> right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California,* 283 U.S. 359, 369; *Herndon* v. *Lowry,* 301 U.S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

There are two fundamental bases for the requirement in civil rights cases of specific definition of the activity which the statute seeks to regulate. First, the blurring of the lines delimiting the coverage of the statute inhibits free expression. The possibility of invoking whatever adverse consequences the statute may have in store for those who violate its terms paralyzes freedom of expression. It is an effective previous general restraint upon all activity which might possibly be touched by the penumbra of the indefinite groupings and classifications established. See *Stromberg* v. *California, supra; Herndon* v. *Lowry, supra; Near* v. *Minnesota,* 283 U.S. 697, 712; *Thornhill* v. *Alabama, supra* (pp. 100-101); *Cantwell* v. *Connecticut, supra.* Clearly in point, likewise, is *Thomas* v. *Collins, supra* (pp. 535-536), in which the Court pointed out that the vagueness of the statute setting up "solicitation" as the area of speech to be regulated left no security for the exercise of the rights which the statute did not purport to reach.

> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not

> be invitation. The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause. The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card."

See, also, Z. Chafee, *Free Speech in the United States* (1946), pp. 474-475.

A second, and closely related reason for this test, is that vagueness in a statute infringing civil rights lays the basis for discriminatory and unfair application. The absence of precise standards makes possible arbitrary enforcement and discrimination in applying the statutory standards where unpopular minorities are involved. Thus in *Jones* v. *City of Opelika,* 316 U.S. 584, 611 (dissenting opinion later made the opinion of the majority in 319 U.S. 103), the Court observed that the record showed that the license fee requirement struck down in that case had been discriminatorily imposed upon the members of Jehovah's Witnesses but not upon ministers of other faiths.

The Court stated (p. 617):

> "We need not shut our eyes to the possibility that use may again be made of such taxes either by discrimination in enforcement or otherwise, to suppress the unpalatable views of militant minorities such as Jehovah's Witnesses . . . As the evidence excluded in No. 280 tended to show, no attempt was there made to apply the ordinance to ministers functioning in a more orthodox manner."

See, also, *Thornhill* v. *State of Alabama, supra* (pp. 97-98); *West Virginia* v. *Barnette, supra,* (p. 628); *Cantwell* v. *Connecticut, supra; Lovell* v. *Griffin, supra; Hague* v. *C.I.O., supra.*

We have observed previously, in Section I above, that such terms as "Communist-Front organizations," "party-line officers," "fellow-travellers" and "subversive officers" have been used by sponsors of Section 9 (h) as equivalents for the categories set up in the Section. Such terms are common in the political arena and, even more so, in industrial disputes. It

is evident that the reasons for the requirement of definiteness have particular application to petitioners, for charges of adherence to subversive political views have been repeatedly resorted to in order to impair the effective functioning of labor organizations.

Most revealing has been the use of this technique in the campaign to nullify the efforts of the Political Action Committee of the Congress of Industrial Organizations. The Un-American Activities Committee issued a Report on the CIO Political Action Committee (*House Report No. 1311, 78th Congress, 2d Session,* March 29, 1944), which stated categorically (p. 76) "A clear majority of the most important unions affiliated with the C.I.O. were and are under the domination of an entrenched Communist leadership." The Report also made the following findings:

> "Whether they belong to these unions by choice or coercion, there are millions of these rank and file CIO members who are wholly guiltless of any sympathy with Communism. The same cannot be said of thousands of the leaders, high and low, of the CIO who are most energetically carrying on the activities of the CIO Political Action Committee." (p. 2.)
>
> "The CIO executive board which established the Political Action Committee is composed of 49 members, among whom there are at least 18 whose records indicate that they follow the 'line' of the Communist Party with undeviating loyalty." (p. 4.)
>
> "A majority (21) of the international unions affiliated with the CIO have an entrenched Communist leadership." (p. 4.)

Of what avail is it to petitioner Philip Murray to know in his heart that he is a patriotic American, that his activities and affiliations have in no way furthered the overthrow of the government; that his every effort has been devoted to the preservation and extension of progressive democratic institutions and that these facts are known to every informed American? Subscribing to the affidavit required by Section 9 (h) might subject him to severe penalties. If it be contended that no penalty would be visited upon him at the moment for claimed false statements in the affidavit, there is, nevertheless,

no assurance that a change in the political temper would not lead to prosecution.

On October 5, 1944, at a public hearing, House Un-American Activities Committee Member Costello made the following remarks concerning the Political Action Committee in discussion with Committee Member Eberharter:

> "MR. EBERHARTER. This committee [Un-American Activities Committee] is using funds appropriated by Congress to employ a high-salaried personnel for a purpose which I think is highly improper, and as I said before, I think every informed observer in Washington will agree with me on that.
>
> "MR. COSTELLO. I will say to the gentlemen that the funds of this committee were appropriated to carry on the work of the Special Committee to Investigate Un-American Activities.
>
> "MR. EBERHARTER. The funds were not appropriated for political campaign purposes.
>
> "MR. COSTELLO. We are not conducting any political campaign whatsoever. We are investigating the subversive activities of the Political Action Committee. We are investigating their Communist background, and that is the purpose for which the funds have been appropriated by the Congress, namely, to investigate these subversive organizations. And, if the gentleman from Pennsylvania thinks he can truthfully say, in view of the evidence that has been presented to this special subcommittee, that the Political Action Committee of the C.I.O. is not a Communist-front organization, then this Dies committee has never displayed to the country any Communist-front organization." (Volume 17, Hearings, October 5, 1944.)

On March 9, 1944, the then chairman of the Un-American Activities Committee, speaking on the floor of the House of Representatives, said of the Political Action Committee:

> "Mr. Speaker, the origin of the idea of the C.I.O. political action committee is of real importance. That origin was definitely within the Communist Party and some of its leaders . . . An examination of the views of Rhylick, Browder, and Dennis shows how they anticipate in every detail the organization and activity of the C.I.O. political action committee." (*Cong. Rec.*, March 9, 1944, p. 2438.)

The petitioners believe that continuation of their activities

in the political and economic fields is vital to the public welfare and to their own interests as individuals. The petitioning labor organizations believe that continuation of the activities of their officers, and especially of their officer Philip Murray, is vital to the extension and preservation of their rights and welfare. If the activities of their officers are to be blanketed by the fear of prosecution, if the officers must choose on the one hand between uttering the oath required by Section 9 (h) and stifling their activities to the point where they cannot be included in the categories of Section 9 (h) by any extension of vague and indefinite language by an over-zealous prosecutor or a hostile administration, or on the other hand leaving their chosen vocation of labor union officer or subjecting their organization to grave restrictions, then the rights of the officers and of the labor organizations and their members are in jeopardy.

Petitioners are mindful of the fact that a charge of misrepresentation in the affidavits might well be made at a time when it would be most damaging to the exercise of petitioners' rights. As this Court is aware, charges of subversive activity against labor organizations are frequently made at a strategic time in an organizing campaign or a collective bargaining situation for the purpose of smearing or discrediting the organization.[8] One example will serve to illustrate the use of this technique. On or about March 24, 1941, the Un-American Activities Committee announced that Communists had penetrated into the Steelworkers Organizing Committee of the CIO (the predecessor of the petitioning labor organization), and that a tie-up of the steel industry was being planned. These statements were issued at a time when the Steelworkers Organizing Committee was negotiating with the U. S. Steel Corporation.

Petitioner Philip Murray, in a communication to the Un-American Activities Committee on or about March 26, 1941, said—

". . . It seems strangely significant that your ground-

[8] During congressional debate, Congressman Klein pointed out that "this provision seems better calculated to evoke slander, recriminations, and confusion, than to approach a solution to the Communist problem." (93 *Cong. Rec.* 3537, April 15, 1947.)

> less charges against C.I.O. always come at a time when they can do the most harm. Obviously you are aware of the negotiations now being conducted with the United States Steel Corporation and the coal operators. I also recall your moving into Chicago last year at exactly the same time that a C.I.O. union was engaged in a Labor Board election at the Armour and Company plants." (*Cong. Rec., 77th Cong., 1st Session,* March 31, 1941, App. pp. 1508-1509.)

It need hardly be pointed out that the phrase in the statute condemning beliefs or membership in or support of "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods," can readily be used to undermine the exercise of legitimate rights by labor unions and their leaders. Charges of belief or membership in "Communist-front" organizations have been characteristically used to undermine the rights of self-organization and collective bargaining which the Act purports to protect. Thus, in *National Labor Relations Board* v. *Sunbeam Electric Manufacturing Company,* 133 F. (2d) 856, 858 (C.C.A. 7), the court, in sustaining a Board finding of employer unfair labor practices, thus summarized a portion of the evidence:

> "Vice President Schroeder addressed the employees over a public address system during the lunch hour at the very time the Board was considering the union's petition. He stated that the union was not qualified as a representative of the employees because it was dominated by Communists. The information as to the domination of the union by Communists was derived from statements contained in the reports of the House Committee to Investigate Un-American Activities, commonly known as the Dies Committee, and from newspapers and magazines. Even these sources of doubtful authority admitted the president of the organization was not a Communist, but they did charge that two of the organizers were Communists."

For examples of the use of the appellation "reds, radicals, and Communists" and variants, to interfere with self-organization of employees, see *N.L.R.B.* v. *Reynolds Wire Co.,* 121 F. (2d) 627, 628 (C.C.A. 7); *Reliance Manufacturing Company* v. *N.L.R.B.,* 125 F. (2d) 311, 314 (C.C.A. 7); *Rapid*

Roller Co. v. *N.L.R.B.*, 126 F. (2d) 452, 456 (C.C.A. 7); *N.L.R.B.* v. *Eclipse Moulded Products Co.*, 126 F. (2d) 576, 580 (C.C.A. 7); *Interlake Iron Corporation* v. *N.L.R.B.*, 131 F. (2d) 129 (C.C.A. 7); *N.L.R.B.* v. *The Fairmont Creamery Co.*, 143 F. (2d) 668 (C.C.A. 10), certiorari denied 323 U.S. 752; *Hickory Chair Mfg. Co.* v. *N.L.R.B.*, 131 F. (2d) 849 (C.C.A. 4); *Matter of Clayton & Lambert Mfg. Co.*, 34 N.L.R.B. 502, 508; *Matter of Butler Bros. and Alex Wasleff*, 41 N.L.R.B. 843, 857.[9]

It is manifest that the phrase "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods" is so vague that it may readily be used to impair the effective exercise of petitioners' rights. Other phrases in the statute are no more definite:

"Affiliated with": This phrase never has been subject to precise definition, though it has been studied extensively by our courts. The history of interpretation of that phrase given in the Supreme Court opinion in *Bridges* v. *Wixon*, 326 U.S. 135, is illuminating as to the wide range of possibilities in interpreting this phrase.

The immigration statute there involved (8 U.S.C.A. Section 137 (f) (2)) stated "the giving, loaning or promising of money or anything of value to any organization, association, society or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." Apparently the Congress believed that the use of the word affiliation without more did not make clear its intent that giving, loaning or promising money or anything of value would constitute affiliation, though the Court made it clear that normally "He who renders financial assistance to any organization may generally be said to approve of its objectives or aims." (p. 143.)

A federal court, interpreting the phrase in that statute, stated that affiliation was not proved—

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[9] Employees of the Board itself have been the targets of similar charges. See Report of Special Committee to Investigate the National Labor Relations Board (H. Rep. 310, pt. 1, p. 150, 76th Cong. 3d Sess. (1940)).

"unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving át least reasonable cause for the charge of a breach of good faith." *United States ex rel. Kettunen* v. *Reiner,* 79 F. (2d) 315, 317 (C.C.A. 2).

The Supreme Court, stated in *Bridges* v. *Wixon, supra,* (p. 142), that Dean Landis had the same conception:

"After stating that 'affiliation' implies a 'stronger bond' than 'association,' he went on to say: 'In the corporate field its use embraces not the casual affinity of an occasional similarity of objective, but ties and connections that, though less than that complete control which parent possesses over subsidiary, are nevertheless sufficient to create a continuing relationship that embraces both units within the concept of a system. In the field of eleemosynary and political organization the same basic idea prevails.' And he concluded: 'Persons engaged in bitter industrial struggles tend to seek help and assistance from every available source. But the intermittent solicitation and acceptance of such help must be shown to have ripened into those bonds of mutual cooperation and alliance that entail continuing reciprocal duties and responsibilities before they can be deemed to come within the statutory requirement of affiliation. . . . To expand that statutory definition to embrace within its terms ad hoc cooperation on objectives whose pursuit is clearly allowable under our constitutional system, or friendly associations that have not been shown to have resulted in the employment of illegal means, is warranted neither by reason nor by law'."

Judge Sears, an examiner in the case, is said by the Supreme Court (pp. 144-145), to have had the following conception of the meaning of the word:

"Judge Sears in his report stated that 'Affiliation is clearly a word of broader content than membership, and of narrower content than sympathy. Generally, there

will be some continuity of relationship to bring the word into application.' But he concluded that that was not necessarily so in view of the statutory definition. And he added: 'Affiliation may doubtless be shown circumstantially. Assisting in the enterprises of an organization, securing members for it, taking part in meetings organized and directed by or on behalf of the organization, would all tend to show affiliation. The weight to be given to such evidence is, of course, determined by the trier of the fact.' That view was apparently shared by the Attorney General. But the broad sweep which was given the term in its application to the facts of this case is illustrated by the following excerpt from the Attorney General's report:

" 'Judge Sears summarizes Bridges' attitude toward the Communist Party and its policies by saying that the "isolated instances," while not evidence to establish membership in or affiliation with the Communist Party, nevertheless show a sympathetic or cooperative attitude on his part to the Party, and form a "pattern which is more consistent with the conclusion that the alien followed this course of conduct as an affiliate of the Communist Party, rather than as a matter of chance coincidence." This conclusion, said Judge Sears, was strengthened by his consistently favoring nondiscrimination against union men because of Communist membership; and by his excoriating "red baiters," as he called those who took an opposite view, which "amounted to cooperation with the Communist Party in carrying out its program of penetration and boring from within".' "

Justice Douglas, speaking of the phrase (pp. 143, 144), said:

"The legislative history throws little light on the meaning of 'affiliation' as used in the statute. It imports, however, less than membership but more than sympathy. By the terms of the statute it includes those who contribute money or anything of value to an organization which believes in, advises, advocates, or teaches the overthrow of our government by force or violence. That example throws light on the meaning of the term 'affiliation.' He who renders financial assistance to any organization may generally be said to approve of its objectives or aims. So Congress declared in the case of an alien who contributed to the treasury of an organization whose aim was to overthrow the government by force and violence. But he who cooperates with such an organization only in its wholly lawful activities cannot by that fact be said as a

matter of law to be 'affiliated' with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. Common sense indicates that the term 'affiliation' in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become 'affiliated' with the Communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."

It is submitted that petitioners have no guide and no notice because of the use of the phrase "affiliated with" in Section 9 (h), and that the statute is thereby defective.

"Believe in": The requirement of an expurgatory oath as to belief is, in itself, repugnant to American conceptions of freedom, for it is in our tradition that a man be judged by his actions and not by his beliefs. See *supra,* p. 17. And the term "belief" itself is elastic and vague.

As defined in Funk & Wagnalls New Standard Dictionary, the term "belief" has many meanings—to accept as true; to be convinced of; to have confidence in; to credit with veracity; to think trustworthy; to be of the opinion.

Not only do each of these definitions have distinct meanings, but it is a necessary concomitant of the word "belief" and of each of these definitions that variations in degree of intensity create as much vagueness in meaning as do the number of possible definitions. Thus, for example, one may be of a certain opinion in the sense that one may accept that opinion

intellectually, or one may be of a certain opinion in the sense that one is a zealot and advocate of that opinion.

"Supports": In the present context, the word apparently was meant to connote something less than membership, for membership is separately provided for. The difficulty is in determining just how much less than membership is conveyed by the word "supports." In an earlier Section (Section 8 (a) (2)), an employer is barred from "contributing financial or other support to a labor organization." Whether this fuller description applies to Section 9 (h) is not clear. Strikingly different interpretations of the word "supports" as it appears in Section 8 (a) (2) of the 1947 Act (formerly Section 8 (2) of the National Labor Relations Act), make it apparent that the concept is vague and uncertain and gives no adequate notice to those who are affected by its inclusion in a regulatory statute. Section 8 (a) (2) provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

In a decision of the Board, *Matter of Mallinckrodt Chemical Works and American Federation of Labor,* 63 N.L.R.B. 373, the Board upheld findings of its trial examiner, Robert N. Denham, now general counsel of the National Labor Relations Board, in which he indicated that contributions made by an employer to an unaffiliated union's social functions did not constitute "support" within the meaning of Section 8 (2), because the union was well established, the contributions did not determine the success or failure of the union's social functions, and the contributions made by the employer were only a small part of the total contributions received by the union. See, also, *Wyman-Gordon Co.* v. *National Labor Relations Board,* 153 F. (2d) 480, 482 (C.C.A. 7) and *National Labor Relations Board* v. *Algoma Plywood & Veneer Co.,* 121 F. (2d) 602, 610 (C.C.A. 7).

Again, the dictionary definition indicates the wide range of meanings. It has been defined to mean: To endure without opposition or resistance; to bear with; to tolerate; to strengthen the position of by one's assistance; to uphold the rights, complaints, authority or status of; to stand by; to provide for

the maintenance of and bear the expense of. (Oxford English Dictionary.) If, as sometimes happens in the political field, an organization were to complain of a denial of civil rights, an individual who asserted that the organization should be accorded its civil rights might be supporting that organization. If an organization were sponsoring a particular political cause, an individual who contributed financial or other assistance to the organization for the particular project might be considered as supporting the organization. It is submitted that there can be no exact understanding of the meaning of the word "support," and that its utilization in this Section means that the Section must fail under the constitutional test of definiteness which applies in free speech cases.

"The overthrow of the United States Government by force or by any illegal or unconstitutional methods": As was pointed out in *Schneidermann* v. *United States,* 320 U.S. 118, 141-142, attachment to the principles of the Constitution does not exclude the desire for radical and fundamental changes in the Constitution. Those who advocate a cabinet system of government in this country, or those who advocate Union Now with Great Britain, or those who advocate a world state, are clearly advocating changes which will alter our Constitution to a radical extent. Must those who subscribe to the 9 (h) affidavit be innocent of supporting or believing in any such doctrines or supporting any organization which has these doctrines as part of its principles? Compare the discussion by Chief Justice Hughes in *Stromberg* v. *California, supra* (p. 369) with respect to the indefiniteness and ambiguity of the clause "opposition to organized government."

In *United Steelworkers of America, C.I.O., et al.* v. *National Labor Relations Board,* —— F. (2d) —— (C.C.A. 7), decided September 23, 1948, Judge Major, in a dissenting opinion, thus condemned the statute for its vagueness:

> "The section applies to 'each officer of such labor organization and the officers of any national or international labor organization.' Such officers are neither enumerated nor defined, either in the section in controversy or otherwise in the Act. While the record does not purport to disclose a list of such officers, it does show that the agreement between the Union and the company was signed

by six officials of the national organization, including Philip J. Murray, as president, and by nine officers of the local Union. From the agreement it is discernible that there are twenty members of the grievance committee with authority to negotiate on the part of the Union, twenty assistant members of the grievance committee, and a safety committee of equal number authorized to represent the Union in its dealings with the company concerning safety matters. I assume that there are hundreds of officers between the bottom and the top of this vast labor organization. The importance of the word 'officer' is evident, partcularly in view of the fact that 'each officer' is given the power by refusal to make the affidavit to paralyze a Union and its members.

"That those who come within the scope of the word 'officer' have been left in a state of uncertainty and doubt is well illustrated by an opinion of the Labor Board. In The Matter of *Northern Virginia Broadcasters, Inc., etc.*, and *Local Union No. 1215, in the National Brotherhood of Electrical Workers,* page 11, volume 75, Decisions and Orders of the N.L.R.B. In that case, the Regional Director, following instructions of the General Counsel of the Labor Board, dismissed the proceeding for failure of compliance with Section 9 (h) by the American Federation of Labor, with which the local Union was affiliated. The Board held that compliance by officials of the national organization was not required, on the ground that such a construction would make the section unworkable. There was a concurring and a dissenting opinion. The point is that the Board itself had great difficulty in deciding who were included in the term 'officer,' and the decision when made was by a divided Board. This emphasizes the difficult problem presented to officers of a Union in attempting to determine whether they are within the scope of persons required to make the affidavit.

"The facts required to be stated in the affidavit are of such an uncertain and indefinite nature as to afford little more than a fertile field for speculation and guess. What is meant by a 'member of the Communist party or affiliated with such party'? How and when does a person become a member of that party, or any other party for that matter? And what does it mean to be 'affiliated'? The Supreme Court, in *Bridges* v. *Wixon, supra,* devoted several pages to the meaning to be attributed to the word 'affiliation,' as used in the deportation statute. The

court's discussion is convincing that its meaning would be quite beyond the reach of the ordinary citizen. As close as the court came to defining the term was (page 143), 'It imports, however, less than membership but more than sympathy.' The court pointed out that cooperation with Communist groups was not sufficient to show affiliation with the party.

"What does the word 'supports' include? Does a person by voting for the candidates of a party or by attending its meetings and making contributions, or by buying its literature or books, become a supporter thereof? And how can the ordinary person possibly be expected to make an affidavit that he is not a member of any organization that believes in or teaches the overthrow of the United States Government 'by any illegal or unconstitutional methods'? These are matters which perplex the Bench and the Bar, and the diversity of opinion among Judges as to what is illegal and unconstitutional often marks the boundary line between majority and dissenting opinions.

"See the recent case of *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, and particularly the concurring opinion by four members of the court, which held unconstitutional Section 313 of the Federal Corrupt Practices Act of 1925, as amended by Section 304 of the instant Act, because of the vagueness and uncertainty of the phrase, 'a contribution or expenditure in connection with any election * * *.' The discussion is quite relevant to the instant situation. On page 153 it is stated:

" 'Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage. In this respect the amendment's policy adds its own force to that of due process in the definition of crime to forbid such consequences. * * * Only a master, if any, could walk the perilous wire strung by the section's criterion.' "

In considering the vagueness of the statute it is important to bear in mind that any false statement is to be punished under

Section 35-A of the Criminal Code (18 U.S.C.A., sec. 80). The crime there defined is to make or cause to be made "any false or fraudulent statements . . . in any matter within the jurisdiction of any department or agency of the United States . . ." The issue in a prosecution under this statute is no longer whether it can be a crime to entertain opinions of which Congress disapproves, but only whether the accused described his beliefs accurately. The issue of truth and falsity and of the defendant's intent would then become questions of fact for a jury. *United States* v. *Presser,* 99 F. (2d) 819 (C.C.A. 2). In such a prosecution, he could not challenge the constitutionality of Section 9 (h), since that would be a matter collateral to the crime charged. *Kay* v. *United States,* 303 U.S. 1, 6; *United States* v. *Barra,* 149 F. (2d) 489 (C.C.A. 2).

The experience of petitioner labor organization and other labor organizations and their officers and members has educated them to the fact that vague charges of "subversion" and "disloyalty" are weapons in industrial disputes. There is overwhelming evidence in our country today of this fact. This statute will inevitably lend itself for service as a weapon by those who do not need too much to make a cry of perjury colorable when they have at their command a statute as broad and as vague and as indefinite as this.

III.

SECTION 9 (h) CONSTITUTES A BILL OF ATTAINDER WITHIN THE MEANING OF ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION AND IS A LEGISLATIVE ACT UNEQUIVOCALLY FORBIDDEN TO CONGRESS

The Constitution expressly excludes a bill of attainder from the legislative powers delegated to Congress. Article I, Section 9, cl. 3 reads: "No Bill of Attainder or ex post facto Law shall be passed." A bill of attainder involves "a use of power which the Constitution unequivocally declares Congress can never exercise." *U. S.* v. *Lovett,* 328 U. S. 303, 307.

A bill of attainder is a legislative act which inflicts punishment without judicial trial upon individuals or easily ascertainable groups. *U. S.* v. *Lovett,* 328 U. S. 303; *McFarland* v.

American Sugar Refining Co., 241 U. S. 79; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

Abhorrence of bills of attainder arises from the same basic tenets of our jurisprudence which have led us to forbid deprivations of life, liberty or property without due process of law. A bill of attainder is an extreme instance of such deprivation. Due process requirements involve notice of the charges brought against an individual, a fair trial in open court, an opportunity to confront and cross-examine witnesses against him, an opportunity to be represented by counsel and an opportunity to present witnesses in his own behalf. None of these safeguards is provided in the case of a bill of attainder. Rather, in a bill of attainder the legislature succeeds in by-passing all of these safeguards by the device of non-judicial sanctions.

The American courts have not been presented with a great number of instances of bills of attainder. This may be explained by the fact that attempts to destroy due process requirements in such complete fashion are characteristic only of periods of political intolerance and hysteria.

> " 'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion, or gross subserviency to the Crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and trample upon the rights and liberties of others.' Story, Com., sec. 1344." *Cummings* v. *Missouri, supra*, p. 323.

James Madison, writing about bills of attainder, expressed the same thought in *The Federalist*, No. 44:

> "Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and pri-

> vate rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."

The 1947 Act is in all respects a bill of attainder.[10] A claimed justification for Section 9 (h) is the prevention of the fomenting of industrial strife and the utilization of industrial strife for political purposes. The Act, however, does not go on to impose a sanction against those who foment industrial strife or use industrial strife for political purpose. On the contrary, the Act proceeds, by legislative declaration and finding, to condemn certain categories of individuals as fomenters of industrial strife for political purposes. The Act then provides for the imposition of sanctions and regulations on these persons.[11]

The Act does not proceed, as is the case in legislation that is in accord with constitutional requirements, by way of defining the harmful activity which it seeks to curb, in the present instance, the fomenting of industrial strife and the use of industrial strife for political purposes, and then permitting the judicial function to come into play by providing for regulations and sanctions against union officers who foment industrial strife or against labor organizations whose officers foment industrial strife. The legislature, in Section 9 (h), usurps the judicial office by making legislative findings that certain cate-

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[10] "Perhaps the most conspicuous trait of the provision is that it is clearly a 'bill of attainder.' " *Barnett, op. cit., supra* (p. 88).

[11] "If Congress had required an affidavit that the officer of the union did not advocate the use of the strike for political purposes or merely to foment strife, and, would not, under penalty so advocate or act, I would find no constitutional objection. But Congress did not do that. It interdicted all members of a named political party." (Prettyman, dissenting, *N.M.U.* v. *Herzog*, 78 F. Supp 146, 180.)

gories of people are responsible for the harmful activity. The function of the judicial process under Section 9 (h) is not to determine whether an individual or individuals has engaged in the activity which the legislature is seeking to curb, but merely to determine whether an individual or individuals comes within the legislatively defined categories of those who are deemed by the legislature to be guilty. This is at the very heart of a bill of attainder and exemplifies its meaning.

The majority of the Court in *N.M.U.* v. *Herzog,*[13] in its ruling that Section 9 (h) does not constitute a bill of attainder, simply prefers Justice Frankfurter's opinion in *U. S.* v. *Lovett, supra,* to the majority position in that case. Justice Frankfurter, though he agreed with the result of the majority decision on other grounds, indicated his doubt that the congressional action there involved was a bill of attainder, as the majority had found. Justice Frankfurter argued that no punishment was imposed because punishment presupposes an action for which the punishment is imposed. While Justice Frankfurter found that the House believed that there was an offense, "being subversive", the Senate had simply provided for withholding pay from the government employees involved without conceiving this to have any relation to any offense or activity on the part of the government employees.

> "Is it clear then that the respondents were removed from office, still accepting the Court's reading of the statute, as a punishment for past acts? Is it clear, that is, to that degree of certitude which is required before this Court declares legislation by Congress unconstitutional? The disputed section does not say so. So far as the House of Representatives is concerned, the Kerr Committee, which proposed the measure, and many of those who voted in favor of the Bill (assuming it is appropriate to

[13] On June 21, 1948, the Supreme Court handed down the following opinion in this case:

"Per Curiam:—The decision of the statutory three-judge court is affirmed to the extent that it passes upon the validity of Sec. 9 (f) and 9 (g) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 135, 136, 143, 29 U.S.C.A. Sec. 141, 159 (f), 159 (g) (Supp 1947). We do not find it necessary to reach or consider the validity of Sec. 9 (h).

"Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set down for arguments." 334 U.S. 854.

> go behind the terms of a statute to ascertain the unexpressed motive of its members), no doubt considered the respondents 'subversive' and wished to exclude them from the Government because of their past associations and their present views. But the legislation upon which we now pass judgment is the product of both Houses of Congress and the President. The Senate five times rejected the substance of Section 304. It finally prevailed, not because the Senate joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of Section 304) without passing any judgment on their past conduct or present views." *U. S.* v. *Lovett, supra* (pp. 324–325.)

It is apparent that even in Justice Frankfurter's view, therefore, Section 9 (h) would be a bill of attainder. There is no doubt from the legislative history (see *supra,* p. 15), that sanctions were imposed for the offense, created by legislative fiat, of holding "subversive" beliefs.

No other technical objection can intrude to blur the fact that Section 9 (h) constitutes a bill of attainder. To constitute a bill of attainder it is not necessary that specific individuals or particular organizations be designated by name; it is sufficient if they are described in general terms which serve to identify the proscribed group. In *U. S.* v. *Lovett, supra* pp. 315-316), the Court said:

> ". . . They *(Cummings* v. *Missouri, supra,* and *Ex parte Garland, supra*) stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Section 304. We do adhere to it."

In *Cummings* v. *Missouri, supra* (p. 323), the Court said: "Those bills are generally directed against individuals by name but they may be directed against a whole class."

The imposition of penal sanctions is not a necessary attribute

of a bill of attainder. *Lovett* v. *United States, supra; Cummings* v. *Missouri, supra, Ex parte Garland, supra.* In the *Cummings* case, the Court pointed out (pp. 321-322):

> "The theory upon which our political institutions rests is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.
>
> "Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri Constitution being, in effect, punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their endorsement."

In this case we are dealing with a provision which forces union officers of certain political beliefs out of office although such beliefs are lawful. The courts have held that to deprive a person of a right to earn a livelihood at any lawful calling is an act of punishment. In this case, as in all three famous cases dealing with the bill of attainder, *Ex parte Garland, supra; Cummings* v. *Missouri, supra;* and *Lovett* v. *United States, supra,* the statute "operates as a legislative decree of perpetual exclusion" from a chosen profession. *Lovett* v. *U. S., supra,* p. 316.

There have been several recent attempts to enact statutes which seek by legislative finding to declare a group or groups of people guilty of some activity which the proponents of the legislation deem harmful, and which impose sanctions and restrictions against the group and individuals therein. One such proposed statute was the Mundt-Nixon Bill (H. R. 5852) in which, as here, the beliefs of a group were legislatively condemned. The Attorney General recommended against the enactment of the statute in an opinion on June 16, 1948 (attached to this brief as Appendix I), on constitutional grounds.

Section 9 (h) suffers from the same constitutional infirmities, especially since it refers to members of a named political party.

IV.

SECTION 9 (h) DEPRIVES PETITIONERS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND ARBITRARILY DISCRIMINATES AGAINST THEM IN VIOLATION OF THE FIFTH AMENDMENT.

The Supreme Court has observed that most of our constitutional safeguards are related to conceptions of fair dealing and the protection of the individual against abuses by government. *U. S.* v. *Lovett, supra,* at p. 321.

Lack of fairness and violation of due process requirements are pervasive in the 1947 Act. The categories which Section 9 (h) attempts to set up are vague and indefinite. The device of an expurgatory oath is used. The 1947 Act makes a legislative declaration of guilt against labor organizations whose officers may include an individual described in Section 9 (h) and against such officer himself; this constitutes a Bill of Attainder and *a fortiori* is a violation of the due process requirements of the Fifth Amendment.

Similarly, in proceeding upon the assumption that groups of people are collectively guilty of certain beliefs deemed harmful and in imposing sanctions against individuals in such groups, the Act does violence to the doctrine of personal guilt.

> "The deportation statute completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted.
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> * * *
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> "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. *Schneiderman* v. *United States,* 320 U. S. 118, 154, 63 S. Ct. 1333, 87 L. Ed. 796. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, Free Speech in the United States (1941), pp. 472-475." Justice Murphy in *Bridges* v. *Wixon, supra,* at p. 163.
>
> ". . . under our traditions beliefs are personal and not a matter of mere association, and that men in adhering

> to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman* v. *United States, supra,* at p. 136.

The late Chief Justice Hughes, speaking in opposition to the expulsion of Socialist members from the New York State Assembly said:

> ". . . It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts." (Memorial of the Special Committee appointed by the Bar of the City of New York, New York Legislative Documents, vols. 143, Session (1920), No. 30, p. 4.)

The evils of imputing guilt by association are evident throughout this legislation. Because one political association, the Communist Party, was said to believe in the desirability of some activity which the legislature thought harmful, each and every member of such party is penalized (by legislative, not judicial action), to the extent of being unable to pursue his chosen vocation in the labor movement. In addition, there is the imputation of guilt by association once removed; each and every labor organization which has such an individual among its officers suffers the statutory sanction.

Further, the legislature seeks to include all individuals who may have only a remote relationship with groups, other than the Communist Party, which hold proscribed opinions. And the legislative catch-all applies to those labor organizations whose officers include among them such an individual.

Nor does the statute reach merely those associated in some way with persons or groups advocating proscribed ideas. The statute applies sanctions to individuals for belief and not merely for their belief, but for the belief of others.

Guilt by association, once given legislative recognition, causes a chain reaction.[13] ". . . one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." (James Madison, *The Federalist,* No. 44.)

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[13] See O'Brian, *op. cit., supra,* at pp. 596-605.

It makes for restriction of civil rights on a broad rather than narrow basis; it makes for vagueness and uncertainty as to the individuals or activities covered. Such legislation is invalid because it does not meet the constitutional tests of the First Amendment. It is also in violation of the due process requirements of the Fifth Amendment.

Due process of law as it is used in the Fifth Amendment is a basic safeguard. One of the things which it has always guaranteed is that no particular person or group should be arbitrarily singled out for legislative action. As the Supreme Court said of the Fifth Amendment in *Hurtado* v. *California,* 110 U.S. 516, 535:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It *must be not a special rule for a particular person or a particular case.*" (Italics supplied.)

Thus even though the Fifth Amendment does not contain, like the Fourteenth Amendment, a clause guaranteeing equal protection of the laws, the courts have recognized not only in the *Hurtado* case, but on many occasions, that discriminatory action which is highly arbitrary and injurious would violate the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U.S. 531; *Wallace* v. *Currin,* 95 F. (2d) 856, 867 (C.C.A. 4), affirmed 306 U.S. 1; *Minski* v. *United States,* 131 F. (2d) 614, 617 (C.C.A. 6); *United States* v. *Ballard,* 12 F. Supp. 321, 325-326 (W.D. Ky.); *U.S.* v. *Yount,* 267 Fed. 861, 863. See, also, *Lovett* v. *United States, supra.*

A law which singles out a particular group in the community for special treatment is justly subject to the condemnation of the Fifth Amendment.

As the court stated in *United States* v. *Ballard, supra* (pp. 325-326):

> "Nothing is more repugnant to the American mind than that . . . among fellow citizens there should be one law for one individual and a different law for another . . . 'Due process of law' has been defined many times as

> meaning the law of the land, and the law of the land implies a general public law, equally binding on every member of the community . . . Purely arbitrary orders directed against individuals or classes are not the law of the land."

We believe that the statute by failing to impose upon employers and employer organizations an affidavit filing requirement and a restriction in their choice of officers is an arbitrary classification in violation of the Fifth Amendment. If the proscribed political beliefs are harmful to industrial relations, they should be deemed equally harmful when entertained by officers of employer groups. Under this statute, labor organizations are virtually forbidden to deal with employers unless they are officered by individuals who hold views approved by Congress. No such limitation is imposed upon employer representatives, nor may it be contended that a comparable sanction—namely, denial of access to the facilities of the Board—is not available. Under the amended Act, the facilities of the Board have been opened to employers for a wide variety of purposes. The failure of Congress to impose upon employers sanctions comparable to those imposed upon labor organizations is an arbitrary discrimination and in violation of the Fifth Amendment of the Constitution.

The discrimination which the statute imposes against labor organizations and their officers is particularly objectionable because it occurs in the field of politics and free expression. The purpose and impact of Section 9 (h) was to impose upon American labor a political orientation approved by Congress. The failure of Congress to limit the political activities of employers and their representatives in similar fashion violates the standard of fairness imposed by the due process clause of the Fifth Amendment.

Section 9 (h) does not present an instance of a situation in which a standard of fairness that is a part of due process requirements has had to yield in some particular to meet a national need. Even in such a case, the due process clause requires strict judicial scrutiny. *Hurtado* v. *California, supra.* This is an instance of a statute which does violence to due process standards, on its face, and at every point in which it

affects the life and liberty of citizens. Such a statute cannot be justified. It must fall under the Fifth Amendment.

V.

THE METHOD OF ENFORCING SECTION 9 (h) DOES NOT SAVE ITS CONSTITUTIONALITY. ON THE CONTRARY, THE STATUTORY SYSTEM OF ENFORCEMENT EMPHASIZES THE UNCONSTITUTIONALITY OF SECTION 9 (h)

Section 9 (h) on its face does not prevent an individual from holding office in a labor union because he refuses to sign the prescribed affidavit, nor does it in terms prevent the labor organization from representing employees or bargaining collectively. The legislative plan is based upon the apparent recognition that individuals are constitutionally immune from punishment for their affiliations and beliefs. To avoid the obstacles which stand in the way of direct sanctions, pressures are created by the statute which are thought capable of effectuating the primary aim of imposing sanctions for political opinion and belief. The statute, by threatening the destruction of a labor organization by its sanctions, seeks to compel the union members to surrender their right to elect officers of their own choice and to compel them to oust officers who refuse to submit to invasion of basic liberties.

We believe that Congress may not do indirectly what the Constitution bars it from doing directly and that, indeed, the sanctions applied to labor organizations of themselves invade the basic rights of the members of these organizations to engage in organizational activity and to select officers of their own choosing. Moreover, we think it clear that the fact that the statutory objective is implemented through the denial of access to a governmental facility—rather than, for example, by a penal law—does not remove the shield of constitutional protection from petitioners.

A. *The sanctions of Section 9 (h) interfere with basic rights to organize and engage in concerted activities.*

The present case arises out of a Decision and Order by the Board in which, *inter alia,* the Board has found that the Company has failed and refused to bargain with the Union.

The right of a labor organization representing the majority of the employees in the appropriate bargaining unit to require an employer to bargain collectively is obviously an important and valuable right. Labor organizations exist and have meaning primarily for the purpose of engaging in collective bargaining. Moreover, the right to engage in collective bargaining with an employer is a vital one to the members of labor organizations. In the absence of such right, the individual members of labor organizations are subject to all of the disabilities resulting from unilateral action by an employer or the handicaps which are imposed by unequal bargaining between the employer and the individual worker. Compare, *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332.

In this case, the Board has refused to make its order that the Company bargain with the Union unconditional, apparently on the ground that a bargaining order is tantamount to certification (see, *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90) and that since the officers of the Union have not complied with the filing requirements of Section 9 (h) an order would frustrate the statutory purpose.

The withholding of the order because it is tantamount to a certification brings into focus other provisions of the statute which impose disabilities upon petitioning unions in the absence of certification. Thus, Section 8 (b) (4) (B) of the 1947 Act provides that it is an unfair labor practice, subject to the sanctions of the Act, for a labor organization—

> ". . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:
>
> * * *
>
> "(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9."

As a result of the operation of this provision the Union, since it is ineligible for a certification, is denied the economic aid of

any other labor organization in seeking bargaining rights. Although prior to the enactment of Section 9 (h) and to the National Labor Relations Act itself, labor organizations enjoyed the right to obtain the assistance of other labor organizations in obtaining recognition or bargaining rights, Section 9 (h) bars petitioners from enjoying such aid because they are ineligible for certification.

Similarly, Section 8 (b) (4) (D) of the Act makes it illegal for a union which has not been certified to use economic means to protect the rights of its members to specific work. This section forbids a labor organization to exert economic pressure where an object thereof is:

> "(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . ."

Thus, activities which were plainly legal in the absence of statute, and which continue to be legal when Section 9 (h) is complied with, are outlawed when undertaken by organizations under the ban of Section 9 (h).

But the Act goes to a greater extreme on this point. Upon the mere filing of a *charge* by an employer or by another labor organization that the petitioners are violating Section 8 (b) (4) (D) of the Act, petitioners would be obliged, under Section 10 (k) of the Act, to have the dispute heard and determined by a special tribunal, the Board. But, in the case of an organization certified by the Board, strikes or other economic action would still be legal in a jurisdictional dispute and recourse to the courts, the parent labor organization of the competing unions, or other normal means of settlement would not be obstructed by the invocation of a special tribunal, the Board.

It is mandatory under Section 10 (l) for the Board to apply for a federal injunction against each of the activities described above when a labor organization not qualified under Section

9 (h) is involved, and, further, the activities are specifically denominated illegal for purposes of a suit for damages. Section 303 (a) and (b) of the Act. Section 303 (b) reads:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

No such liability is imposed upon organizations conforming to the affidavit requirement, though such organizations may have engaged in identical activities.

These sanctions, unfair labor practices orders, injunctions and damage suits, also apply to outlaw any economic action by non-conforming labor organizations where the object is "forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9." Section 8 (b) (4) (C). An organization may thus be excluded finally and definitely from the collective bargaining process. The prime purpose of its employee members, in organizing together and engaging in concerted activities may be thwarted by this statutory obstacle to its achievement.

What we have said up to this point comes to this: The denial to the Union and the members of the right to bargain collectively by the conditional order in this case involves a loss of important rights by the Union and its members. This denial in itself involves an abridgment of fundamental rights to engage in organizing since the purpose of organizing is collective bargaining. Moreover, the withholding of the bargaining order, although no question existed that the Union represents the majority of the employees, subjects the Union to certain additional disabilities. The Board's ruling that the Union is ineligible for certification exposes it to injunctions and damage suits should it seek to engage in certain forms of concerted activities which have traditionally not been illegal

in this country. Similar disabilities are not imposed upon unions which conform to the affidavit filing requirement.

This case involves the denial to the Union of bargaining rights. But, as is apparent from the language of Section 9 (h) quoted above, that section imposes upon non-conforming labor organizations a broad system of disabilities of which those directly involved here are a particularized instance. Thus, Section 9 (h) prevents a non-conforming labor organization from obtaining any form of statutory relief against employer unfair labor practices of any type. Such a labor organization would be confined to economic warfare alone in protecting itself against employer interference or coercion, against the establishment of company-unions or discriminatory discharges, as well as against a refusal to recognize and bargain. In short, Section 9 (h) would confine petitioning labor organization to the exercise of its economic strength in protection against employer attempts to destroy it.

The extreme scope of Section 9 (h), its impact upon the rights and functions of labor organizations, is perhaps best illustrated by the limitations imposed by that section upon the process of choosing bargaining representatives. Section 9 (h) of course bars an organization with non-conforming officers from the ballot in Labor Board elections. Although it is a purported objective of the statute to assure the designation of employees of "representatives of their own choosing," it is obvious that this objective is entirely frustrated by an election which deprives the employees of the opportunity to choose a candidate which may represent a majority of them. A rival labor organization appearing on the ballot for certification may be an employer-dominated organization but the non-conforming organization would have no opportunity to demonstrate this fact since it cannot initiate a proceeding upon the basis of which a complaint of employer-domination may issue.

The Board has not confined Section 9 (h) to election situations in which the non-conforming union is the petitioner. It has barred the non-conforming union from the ballot when a conforming labor organization filed a petition and the non-conforming union appeared as an intervenor. *Matter of Schneider Transportation Co.*, 75 N.L.R.B., No. 107. Even

in situations in which a labor organization has been the bargaining agent and held a contract, the Board has refused to permit it to defend its bargaining rights against the challenge of the petitioning competitor union. *Matter of Sigmund Cohn & Co.*, 75 N.L.R.B. No. 177. It has adhered to the same rule and has refused to put the name of the non-conforming union on the ballot as well in a case initiated by an employer's petition under Section 9 (c) (1) (B). *Matter of Herman Loewenstein*, 75 N.L.R.B. No. 47.[14]

The Board has ruled, moreover, that an incumbent non-conforming union which has previously enjoyed bargaining rights is not only barred from appearing on the ballot but can only occupy an extremely limited role in the election hearing. It has no voice with respect to the terms and conditions of the election; it may not be represented by watchers at the polls or challenge the eligibility of voters or object to conduct which may interfere with the election either on the part of the employer or of the participating union. If its contract has expired at the time of the hearing it is completely silenced and may not even urge that the unit is inappropriate or that no question concerning representation exists. *Matter of Precision Castings Co.*, 77 N.L.R.B., No. 33.

As this section has been interpreted and applied, a non-conforming labor organization which may have previously enjoyed bargaining rights for years is powerless to prevent collusively arranged consent elections between an employer and a rival organization under which a bargaining unit may be so gerrymandered, voting eligibility standards so juggled, as to insure the election of an unrepresentative bargaining agent. Compare, *Fay* v. *Douds*, 78 F. Supp. 703 (D.C., S.D. N.Y.).

In short, as a result of the application of Section 9 (h) the very purpose of the Act, namely, to promote self-organization and collective bargaining has become perverted; industrial strife and unrest, which it was the purpose of the statute to remove by encouraging freedom of choice and collective

[14] However, where employees filed a petition for decertification under Section 9 (c) (1) (A) (2) to unseat an incumbent non-conforming union, the Board held that the name of the union must be placed on the ballot lest its non-compliance immunize it against removal as the bargaining agent. *Matter of Harris Foundry and Machine Co.*, 76 N.L.R.B., No. 14.

bargaining, have been stimulated. Employers aware of the disabilities imposed upon non-conforming labor organizations have been encouraged to rupture existing bargaining relationships and to question the representative status of unions on any pretext. Other labor organizations have been quick to take advantage of the disabilities the statute confers upon non-conforming labor organizations and "raiding" on a widespread scale has become prevalent.

Nor may it be said that in all of the instances in which non-conforming organizations have suffered injury as the result of their non-conforming status they are left free to utilize their economic power to obtain relief. As already noted, the Act makes it illegal to strike in order to obtain recognition where another labor organization has been certified regardless of the fact that the certified organization may be wholly unrepresentative of the employees. Similarly, an uncertified labor organization, as already noted, is powerless to obtain assistance from another labor organization under the new statute in its efforts to obtain recognition.

Section 9 (h) also invades important rights in connection with union security. Section 8 (a) (3) of the Act reads, in part, as follows:

> "Sec. 8 (a) It shall be an unfair labor practice for an employer—
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> * * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have

certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement . . ."

This provision, in conjunction with Section 9 (h), effectively bars the petitioners from entering a union security agreement. In the absence of this statute, there would be no bar to a labor organization and an employer agreeing to such provisions. Indeed, union security agreements were common prior to enactment of the National Labor Relations Act in 1935, and were characteristic of certain important industries. See Toner, *The Closed Shop* (1942) Ch. 3, p. 58. But, Section 9 (h) denies to petitioners, concededly the bargaining agents of the employees, the right to enter into a union security contract with the employers or to strike to achieve such objectives. *Evans* v. *International Typographical Union,* (D.C., S.D., Ind.), 21 LRRM 2553. No such restrictions are imposed upon labor organizations which have yielded to the affidavit requirements of Section 9 (h); they may pursue the traditional trade union objective of seeking union security.

The administrative effects of Section 9 (h) upon non-conforming labor organizations by no means exhaust the effects of that section. For Section 9 (h) also deprives these organizations of vital access to the courts. This is so because courts will not entertain suits at law or in equity by unions to protect bargaining or organizational rights on the ground that this is an area entrusted exclusively to the Board. See, for example, *Amazon Cotton Mills* v. *Textile Workers Union* 167 F. (2d) 183 (C.C.A. 4); *International Longshoremen's Union* v. *Sunset Line & Twine Co.* (D.C.N.D. Cal.) 21 LRRM 2635. And there is a growing tendency to apply Section 9 (h) standards in State courts.[15]

The full impact of Section 9 (h) upon non-conforming organizations, such as petitioner, is to impair collective bargaining, to imperil its representative status in plants in which

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[15] The scope of Section 9 (h) is indicated by such cases in state courts as *Fulford* v. *Smith Cabinet Mfg. Co.*, 77 N.E. (2d) 755 (Ind. App. Ct.) which holds "it is the plain intent of the Act that if a union is not eligible for certification it cannot compel recognition as the representative of the employees, and need not be recognized as such." See, also, *Simons* v. *Retail Clerks Union* (Cal. Sup. Ct.), 21 LRRM 2685.

it has functioned for years; to promote the selection of unrepresentative bargaining agents; to encourage industrial unrest; to invite repudiation of the bargaining relationship; to make futile and meaningless the organizing process, and to make illegal the exercise of traditionally sanctioned concerted activities.

As was pointed out by Mr. Justice Prettyman, dissenting, in *N.M.U.* v. *Herzog,* 78 F. Supp. 146, 179:

> "It is perfectly obvious that a labor union which is prohibited from being the bargaining representative of any of its members with any employer, will not remain long in existence. It is denied the chief function of a labor union and obviously can present to employees little reason for membership in it. These are simple, realistic facts."

We believe that the injury imposed upon petitioners in this case amply grounds a constitutional attack upon Section 9 (h). We assert, moreover, that when this injury is viewed in the context of the statutory scheme of which it is an integral part it is plain that petitioning labor organization and its members have been deprived of valuable constitutional rights. For the right to organize necessarily involves the basic right of assembly and the right to communicate and to persuade to action. This was recognized as long ago as 1842 by Chief Justice Shaw, in *Commonwealth* v. *Hunt,* 4 Metc. 111 (Mass.).

As the Supreme Court stated in *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418:

> "Society itself is an organization, and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of working men to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association."

In 1921, in *American Steel Foundries* v. *Tri-City Central Trades Council, supra* (p. 209), the Supreme Court said of labor organizations:

> "They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought

> fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer."

In 1932 in the Norris-LaGuardia Act, Section 102, the broad right of workers to associate was again affirmatively made an object of federal protection.

The National Labor Relations Act in 1935 expressly gave protection to "the exercise by workers of full freedom of association." In 1937 the Court, in upholding the validity of the National Labor Relations Act, held in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34:

> "That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it."

See also *Texas and New Orleans Railroad Co.* v. *Railway and Steamship Clerks,* 281 U.S. 548; *Hague* v. *C.I.O.,* 307 U.S. 496.

As the dissenting opinion in *United Steelworkers of America, C.I.O.* v. *National Labor Relations Board, supra,* points out:

> "It is well to keep in mind, however, what the Board appears to overlook, that is, that employees have certain constitutional rights irrespective of any benefit bestowed by the Wagner Act or its successor. It has been held that the right to organize for the purpose of securing redress of grievances and to permit agreement with the employers relating to rates of pay and conditions of work is a constitutional right, and that the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other material protection is fundamental. Further, that employees have as clear a right to organize and select their representatives for a lawful purpose as an employer has to organize its business and select its own officers and agents. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 33. And it has been held that the right of workmen or of Unions to

assemble and discuss their own affairs is fully protected by the Constitution as the right of business men, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others. *Thomas* v. *Collins,* 323 U. S. 516, 539. And as employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the officials of such Union, so I would think that the bargaining agent when so selected had a right of equal standing to represent for all legitimate purposes those by whom it had been selected. The employees in the instant situation have availed themselves of constitutional rights in selecting the Union as their bargaining agent and in the election of its officials.

"At this point it is pertinent to observe that the Wagner Act was enacted primarily for the benefit of employees and not for Unions. The latter derive their authority from the employees when selected as their bargaining agent, rather than from the law. The very heart of the Act is contained in Section 7, which provides: 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing * * *.' This was not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect. This is clearly shown by the declared policy of the Act that commerce be aided 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection'."

Not only the organizing process but the day-to-day functioning of a labor organization involves the exercise of civil rights. In meeting and disseminating ideas, opinions, views and suggestions, in publishing and circulating literature containing such views, in speaking to non-members to induce them to join, and in proposing and supporting legislation, members of labor organizations are expressing their rights of free speech, assemblage, press and petition guaranteed by the First Amendment. See, for example, *Thomas* v. *Collins,* 323 U.S. 516; *Thornhill* v. *Alabama,* 310 U.S. 88.

These rights are improperly invaded by Section 9 (h).

B. ***The sanctions of Section 9 (h), by impairing the right of union members to choose their own officers, invade rights of freedom of assembly and freedom of speech of members of labor organizations.***

The theory of the statute is that, by erecting certain obstructions to their efforts to engage in self-organization and collective bargaining, members of labor organizations may be compelled to eliminate officers holding proscribed views. This novel theory, which seeks to coerce individuals into applying sanctions against others whose political views are deemed harmful, cannot survive the Constitution.

This device constitutes a deliberate interference with the freedom of labor union members to choose their own officers. Congress has commanded that unless the officers who are chosen by labor union members entertain approved political views, the sanctions of the statute will be visited on the labor organization. Labor union members are told that the price for the union's access to the organizational and collective bargaining process is the surrender of the right to choose their own officers. We do not believe that the commerce power, or any other power of Congress, may be used to accomplish this end, for the right to assemble obviously includes within it the right of members of an organization freely to elect their own officers and the right of free speech.

The point is made clearly by Judge Prettyman, dissenting in *N.M.U.* v. *Herzog, supra* (p. 178):

> "This is an abridgment of the rights of the members of the union to select their officers. Since the officers are, realistically and in common practice, the managers of the affairs of the organization and the spokesmen in its behalf, limitations upon their selection are limitations upon the speech and assembly of the members. Certainly the selection of officers is an essential element of an assembly and also of mass speech by a group of individuals."

And the dissent in the *United Steelworkers* case, *supra*, described the impact of the statute on the rights of union members as follows:

> "In order to comply with the condition of the Board's order, they must select a bargaining agent not of their own choosing but one which conforms to the pattern

> which Congress has prescribed. The fundamental right to elect officers of their Union, untrammeled and unfettered, has been made subservient to the congressional edict as to the character of officials which will be tolerated. Not only does the section represent an intrusion by Congress in the internal affairs of a Union and its members, but it is legislative coercion expressly designed to compel Union members to forego their fundamental rights.
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> * * *
>
> "The upshot of the whole situation is that employees when members of a Union are under a continuing compulsion to elect officers who will meet the congressional prescription in order that their Union may remain in the good graces of the Board, and they must do this even though it be contrary to their belief, conscience and better judgment. Experience, ability, honesty and integrity of candidates for official positions in the Union must be cast aside."

The relationship between the choice of officers and free speech was pointed out by Justice Jackson in his concurring opinion in *Thomas* v. *Collins, supra* (p. 546):

> "The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies . . . If free speech anywhere serves a useful social purpose, to be jealously guarded, I should think it would be in such a relationship . . ."

Compare, *Hill* v. *Florida,* 325 U. S. 538.

Of compelling significance is the decision of the Supreme Court in *Martin* v. *City of Struthers, Ohio,* 319 U.S. 141. In that case the municipality passed an ordinance outlawing the distribution of literature when the person distributing it rang a doorbell or otherwise summoned the inmate of the residence to the door for the purpose of receiving such literature. Instead of meeting the problem by permitting such individual to decide for himself whether he would receive the literature, the municipality flatly outlawed the entire practice of ringing doorbells as a means of distributing literature. The Court pointed out (at p. 147), that an appropriate regulation would

leave the decision as to whether distributors of literature might lawfully call at a home where it belongs, namely, with the homeowner or resident himself. The municipality, the Court held, could not substitute its judgment for the judgment of the individual as to whether such literature should be received. In the same way Congress here has substituted its judgment for the judgment of the union member as to choice of union officers.

It is no answer to say that there is no outright interference with the freedom of union members to choose their own officers. It was the intention of the Congress to impose political tests upon union officers. As the House Labor Committee states (H. Rep. No. 245, 80th Cong., 1st Sess., p. 38), the section "makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and who temporize with it, to clean house or risk loss of rights under the new act." But Congress is forbidden by our Constitution to intrude into the area of political belief and opinion either for the purpose of barring individuals from holding office or coercing others to bar them. And Congress may not do indirectly what it is prevented from doing directly either through the use of the commerce power (*Hammer* v. *Dagenhart,* 247 U. S. 251), the tax power (*Linder* v. *United States,* 268 U. S. 5) or any other power. Nor may it impose an otherwise illegal condition by labelling its action the withholding of a privilege rather than the destruction of a right. *Frost* v. *Railroad Commission,* 271 U.S. 583.

C. ***The character of the sanction does not immunize Section 9 (h) from constitutional attack based upon the First Amendment.***

The Board will undoubtedly seek to defend the statute (compare *N.M.U.* v. *Herzog, supra*) upon the ground that the statute does not in fact interfere with the exercise of the basic rights protected by the First Amendment, that Section 9 (h) leaves non-complying labor organizations where the National Labor Relations Board found them in 1935, that it merely withdraws certain "privileges" from labor organizations, and

that these "privileges" may be withdrawn without regard to the tests which are ordinarily applied when constitutional rights are invaded.

As we have already indicated, the impact of the sanctions is such as to make it difficult, if not impossible, for labor organizations to function.

We submit further that in view of the broad impact of Section 9 (h) upon labor organizations, their officers and members, it is unsound and unrealistic to assert that the use of Labor Board facilities is after all a "privilege," the granting or withdrawal of which is immunized from normal constitutional considerations. To speak in these terms is to ignore the fact that Section 9 (h) has converted the Act into an instrument for suppressing the rights which it purports to safeguard and for outlawing activities which have never rested upon federal statute. Fundamentally, such a view disregards the fact that a change in the nature of the protections surrounding unions is a change of such substance as necessarily brings into play constitutional tests.

For some twelve years, the right of employees to self-organization and to act concertedly through representatives of their own choosing has been protected by law. The concept of collective bargaining has become a part of the *mores* of our community and government protection against interferences with self-organization and collective bargaining has become the norm.

The drastic alterations effected by Section 9 (h) in the entire structure of organizational and collective bargaining rights cannot be accomplished without regard to constitutional guarantees. See, *Truax* v. *Corrigan,* 257 U.S. 312; *Senn* v. *Tile Layers' Union,* 301 U.S. 468.

Justice Prettyman, dissenting in *N.M.U.* v. *Herzog, supra* (pp. 179, 180), considered this point from a somewhat different aspect, but arrived at the same result:

> "Congress cannot establish a Government facility which in practice becomes a necessity to activity in that field, and then impose upon the use of the facility a requirement that the persons involved waive a constitutional right; unless the necessities of the situation, which I shall discuss

in a moment, require it. The cases dealing with newspapers and the second-class mail privileges are in point. (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, 90 L. Ed. 586, 66 S. Ct. 456 (1946); see Mr. Justice Brandeis and Mr. Justice Holmes, dissenting in United States *ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson*, 255 U.S. 407, 417, 436, 65 L. Ed. 704, 41 S. Ct. 352 (1921).)

"Congress established by the National Labor Relations Act a system for determining an exclusive bargaining representative for employees in appropriate units of employ. As a result of that system, one representative, and one only, is the representative of all the employees in negotiating and contracting with the employer in respect to wages, hours, and terms and conditions of employment. It is perfectly obvious that a labor union which is prohibited from being the bargaining representative of any of its members with any employer, will not remain long in existence. It is denied the chief function of a labor union and obviously can present to employees little reason for membership in it. These are simple, realistic facts. Denial of the privilege of appearing on a ballot in any and every election of bargaining representatives is, in actual fact, a destruction of the union involved. Congress has created a facility the use of which has become an essential to the life of a labor union. A condition imposed upon the use of such facility is a limitation upon the existence of the union. Thus, a requirement as to political belief, imposed upon the use of the facility, is not a mere condition upon a privilege; it is, in fact, an abridgment of political belief."

Even if it be assumed that all that is involved here is the formal withdrawal of facilities that are made available to others rather than outright extinguishment of constitutional guarantees, that fact would not serve to cure the defects of the statute. For a denial to unions of facilities of the Act affects large numbers of individuals in important ways. Such a denial therefore is not constitutionally distinguishable from a denial of the use of the mails (*Hannegan* v. *Esquire*, 327 U. S. 146), the public parks (*Saia* v. *People of New York*, 334 U. S. 558), the public schools (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *People of State of Illinois, ex rel. McCollum* v. *Board of Education*, 333 U. S. 203), public thoroughfares and highways

(Hague v. *C.I.O.,* 207 U. S. 496, *Marsh* v. *Alabama,* 326 U. S. 501) and public buildings (*Danskin* v. *San Diego Unified School Dist.,* 28 Cal. (2d) 536, 171 P. (2d) 886). Not only these but even cases involving only property rights (see, for example, *Frost* v. *Railroad Commission,* 271 U. S. 583, 593) make it clear beyond question that it is no defense to a denial of constitutional guarantees that the denial has been accomplished by the withdrawal of a facility. Moreover, these cases make it abundantly clear that it is no defense to a denial of constitutional guarantees that the rights which have been invaded by the withdrawal of governmental facilities may be exercised in alternative ways or places. The fact that the individuals and groups who suffer impairment of their constitutional rights may resort to alternative public or private facilities in no way justifies interferences with their freedom through conditioning the use of a particular governmental facility. See, in addition to the cases cited above, *Schneider* v. *New Jersey,* 308 U. S. 147, 163, where the Supreme Court declared that "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Indeed, where, as here, the fact that the facility is "largely gratuitous makes clearer its position as a right, for it is paid by taxation." Justice Brandeis, dissenting, in *U. S. ex rel. Milwaukee Publishing Company* v. *Burleson,* 255 U. S. 407, 433.

Thus, in the present case, the fact that the union might conceivably (but see, *supra,* p. 49) enjoy organizational or bargaining rights without the use of Board facilities in no way justifies the infringement of basic rights in the withholding of such facilities.

We believe that upon any view of the nature of the sanction imposed by Section 9 (h), the tests normally applied where deprivation of constitutional rights of free expression is claimed are required. Even in the field of immigration, the Supreme Court has rejected a contention that since Congress has "plenary" power in the field, its exercise is not to be judged by standards imposed by the Bill of Rights. *Bridges* v. *Wixon,* 326 U. S. 135.

As a recent writer has put it *(Constitutionality of the*

Taft-Hartley Non-Communist Affidavit Provisions, 48 Col. Law Rev. 253, 257):

> "It is, of course, apparent that Congress is under no constitutional compulsion to create for anyone such facilities as the NLRB affords. However, the same general standard of reasonable discrimination prevails when government bestows services as when it imposes burdens or inflicts punishment. It has been held, for example, that a state may not withhold from Negroes the legal education it provides for others, [*Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right."] nor condition the use of its school buildings for political meetings on an oath disavowing seditious beliefs. [*Danskin* v. *San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P. 2d 886 (1946).] Where Congress has provided work relief to those in need, denial of this aid to Communists, Nazis and aliens has been declared invalid. [*United States* v. *Schneider*, 45 F. Supp. 848 (E.D. Wis. 1942).] In addition, the Supreme Court has indicated that the power to select recipients of second-class mailing privileges is not unlimited. [*Hannegan* v. *Esquire*, 327 U. S. 146, 156 (1946); and see Mr. Justice Brandeis, dissenting in *United States* v. *Burleson*, 255 U. S. 407, 429-34 (1921).] It is common knowledge that innumerable groups and individuals look to the Federal Government for services essential to livelihood. Complete Congressional discretion in dispensing such services would be an anomaly in a system which includes judicially enforced standards of due process."

The statute cannot be shielded from constitutional attack upon the ground that the Government may offer its facilities on any terms it chooses or on the basis of a contention that labor organizations and their officers waive the protection of the Constitution when they use the facilities of the statute, or by an insistence that petitioners may escape the invasion of Constitutional rights by resort to facilities or methods other than those whose use has been unconstitutionally conditioned.

The injuries which Section 9 (h) has imposed upon peti-

tioners are not beyond the reach of this Court. The Constitution deals with realities not labels *(Gompers* v. *United States,* 233 U. S. 604, 610; *Near* v. *Minnesota* 283 U. S. 697, 708), and the Bill of Rights would not be the precious safeguard it is if its applicability turned upon refinements in the character of the restraint. While clothed in the ill-fitting garb of a regulation of commerce (compare *Pollock* v. *Williams,* 332 U. S. 4) the statute suppresses rights which are at the root of our constitutional system. As the Supreme Court has reminded us in *Thomas* v. *Collins, supra* (p. 530), in constitutional cases "it is the character of the right, not of the limitation, which determines what standard governs the choice."

VI.

NO VALID JUSTIFICATION EXISTS FOR THE STATUTORY INVASION OF BASIC RIGHTS OF FREEDOM OF BELIEF, SPEECH AND ASSEMBLY AND THE STATUTE DOES NOT MEET THE TESTS WHICH MUST BE APPLIED WHERE CURBS UPON CIVIL RIGHTS ARE INVOLVED

A. *The burden of establishing that Section 9 (h) is constitutional is upon the Board.*

Ordinarily when regulatory legislation is challenged on the ground that it conflicts with the individual's interest (pecuniary or otherwise) in being free from regulation, its validity can be established by a showing that a permissible legislative power is being reasonably exercised. Regulatory legislation must inevitably impinge on, and limit some individual's private interest in being free from regulation. But under our form of government the authority to make the judgment as to whose interests must yield is vested in the legislature. *Miller* v. *Schoene,* 276 U. S. 272. Indeed, a premise of our democratic system is that the individual is able to participate in the legislative decisions affecting his private interests through the ordinary political processes and the exercise of his right to be heard.

However, when the right to engage in political activity is curtailed the opportunity to influence and receive redress from

adverse official action is cut off. It is therefore not the case that the right of freedom of expression is simply one of a multitude of private interests which the legislature may treat with as it sees fit. The right of free expression and the right to engage in political activity is a basic right because without it the means of obtaining redress against a bad law, the means of insuring peaceful change in a democratic society, is lost.

See, *Schneider* v. *New Jersey,* 308 U. S. 117, 161; *Thornhill* v. *Alabama,* 310 U. S. 88, 101-102; *Bridges* v. *California,* 314 U. S. 252, 262-263.

As we have already pointed out, *supra,* p. 18, there is a key relationship between the exercise of civil rights and our political processes, between the right to political expression and the responsiveness of our government to the will of the people. Because of this the Supreme Court has recognized that Congress cannot be its own judge of the propriety of curtailing rights of political expression and that the courts themselves must undertake a special responsibility for the protection of such rights.

This thought was given expression by Mr. Justice Stone in *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153, in which he stated:

> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; on restraints upon the dissemination of information, see *Near* v. *Minnesota,* 283 U. S. 697, 713-714, 718-720, 722; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Lovell* v. *Griffin,* supra (303 U. S. 444); on interferences with political organizations, see *Stromberg* v. *California, supra* (283 U.S. 359) 369; *Fiske* v. *Kansas,* 274 U.S. 380; *Whitney* v. *California,* 274 U. S. 357, 373-378; *Herndon* v. *Lowry,* 301 U. S. 242; and see Holmes, J., in *Gitlow* v. *New York,* 268 U. S. 652, 673; as to prohibition of peaceable assembly, see *DeJonge* v. *Oregon,* 299 U. S. 353, 365.

> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce* v. *Society of Sisters,* 268 U. S. 510, or national, *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; *Farrington* v. *Tokushige,* 273 U. S. 284, or racial minorities. *Nixon* v. *Herndon,* supra; *Nixon* v. *Condon,* supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Those who advocate legislation abridging rights of political freedom must overcome the presumption of invalidity which attaches to legislative encroachment on such fundamental liberties.

As the Supreme Court pointed out in *West Virginia State Board of Education* v. *Barnette, supra,* at p. 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

See, also, *Thomas* v. *Collins supra,* at pp. 529-530; *Schneider* v. *New Jersey,* 308 U. S. 147.

B. ***Section 9 (h) does not meet the standards by which curbs upon civil rights guaranteed by the First Amendment must be justified***

The Supreme Court, in a long series of cases, has made it very clear that fundamental rights can avoid a clash with the Constitution only if three basic requirements are met:

(1) The statute must be narrowly drawn to deal with the precise evil which the legislature is seeking to curb. *Schneider* v. *New Jersey, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *DeJonge* v. *Oregon, supra.*

(2) The activity in the realm of civil rights which the statute seeks to regulate must be specifically defined so as to leave the individual secure to engage in conduct not within the precise reach of the statute and free of fear of discrimination in enforcement which a loosely drawn statute invites. *Cantwell* v. *Connecticut, supra; Thornhill* v. *Alabama, supra; Herndon* v. *Lowry, supra, Stromberg* v. *California, supra.*

(3) In no event may opinion or belief be regulated or curbed *(West Virginia* v. *Barnette, supra; DeJonge* v. *Oregon, supra)* and where advocacy or expression is regulated, such advocacy or expression must present a clear and present danger to a substantial interest which the State has a right to safeguard. *Bridges* v. *California,* 314 U. S. 252, 261; *Thomas* v. *Collins, supra; Herndon* v. *Lowry, supra; Thornhill* v. *Alabama, supra; Hartzel* v. *United States,* 322 U. S. 680, 687; *Pennekamp* v. *Florida,* 328 U. S. 331, 352-353.

The Board cannot possibly meet its burden of showing that Section 9 (h) meets these constitutional standards.

1. ***The statute is not narrowly drawn but invades basic rights unrelated to its claimed purpose***

The evil to which section 9 (h) is directed is, according to the Board's presentation in *N.M.U.* v. *Herzog, supra,* the utilization of labor organizations, by officers of such organizations holding the proscribed political beliefs, to foment industrial strikes for political purposes. But legislation does not, in fact, direct itself to this claimed disturbance of commerce. This is not a statute which regulates, limits or prohibits a particular kind of strike. It attacks belief, not conduct.

On the other hand, if it is the theory of the statute that labor organizations depart from their legitimate objectives when they elect individuals holding certain political views to positions of leadership we submit that Congress was required to deal narrowly with this problem and with this problem only, carefully adjusting the restraints to the claimed abuse.

In this case all individuals holding broadly defined political views are subject to the statutory restraints and the sanctions are imposed not upon them directly but upon third parties. But just as a state may not cure the "nuisance" of littering the streets by forbidding leaflet distribution or the evil of loud and disturbing noises by forbidding the use of loudspeakers on all occasions, so Congress cannot in Section 9 (h) impose blanket obligations upon whole classes of individuals and address dragnet sanctions to millions of members of labor organizations without regard to the principles of the First Amendment.

In *Lovell* v. *Griffin, supra* (p. 451), the Supreme Court stated that the ordinance there in question

> "is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of streets. The ordinance prohibits the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the city manager.
>
> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press."

In *DeJonge* v. *Oregon, supra* (at pp. 364-365), the Supreme Court struck down a criminal syndicalism law, saying,

> "The people through their Legislatures may protect themselves against . . . abuse [of free speech or press]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

In *Schneider* v. *New Jersey, supra* (at p. 162), the Supreme Court said:

> "this constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods to prevent littering. Amongst these is punishment of those who actually throw papers on the streets."

In *Thornhill* v. *Alabama, supra* (at p. 105), the Supreme Court struck down a broadly drawn anti-picketing ordinance and pointed out that the statute which is the source of the restriction on free speech must be "narrowly drawn to cover the precise situation giving rise to the danger". See also *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, 116 and *Saia* v. *New York, supra.*

If there is one evil which infects Section 9 (h) it is the failure to adhere to this teaching of the Supreme Court in connection with the protection of First Amendment rights.

2. ***The activity which is sought to be regulated is not specifically defined***

As we have already pointed out (*supra,* p. 43), Section 9 (h) is so vague as to present a violation of the Fifth Amendment protection of due process of law. We contend, moreover, that even if the vagueness of Section 9 (h) is not sufficient to bring it within the reach of the Fifth Amendment it nevertheless condemns the section for purposes of the First Amendment. See cases cited *supra,* at pp. 25 *ff*.

The protections of political freedom cannot be safeguarded when, because of the vagueness of the section, labor union leaders are forced to walk a tightrope between the areas of what is forbidden and what is permitted.

The officers of labor organizations have important duties and responsibilities in the political sphere. But if vague legislation makes these leaders timorous in their political activities, if caution tempers their zeal in seeking political goals they and their membership deem desirable, if uncertain notice as to the confines of the statute makes them hesitant about joining together with other individuals and groups in driving toward common political projects, their freedom of political activity, and, more importantly, the freedom of political activity of workingmen and of the organizations in which they have associated, will suffer.[16]

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[16] It is worthy of note that the filing requirements imposed by Section 9 (h) are not static. The statute requires annual returns and consequently creates a continuing problem with respect to the vagueness of its scope which affects their everyday political activities.

3. ***Section 9 (h) is primarily a curb upon opinion or belief, which enjoys constitutional immunity from any regulation; to the extent that Section 9 (h) regulates expression and advocacy it is unjustified, since the Board cannot meet the clear and present danger test.***

As we have already demonstrated, *supra,* p. 17, Section 9 (h) is primarily if not exclusively a restraint upon opinion and belief. Since this is so, it is an invalid limitation upon constitutional freedoms for which no justification may be offered. However, even if the statute be viewed as one restricting expression or advocacy, it fails to meet the clear and present danger test.

The clear and present danger rule as a test of the constitutionality of statutes restricting freedom of expression has been expressed in various ways. In *Bridges* v. *California, supra,* at p. 263, the Supreme Court said: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." The rationale for this applicable test is given us by the Supreme Court in *Thomas* v. *Collins, supra.* The Court there made it clear (p. 530) that the legislation must have clear support in public danger, actual or impending, and that "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." The Board itself has conceded that Section 9 (h) does not meet this test. *United Steelworkers of America* v. *National Labor Relations Board, supra; Wholesale & Warehouse Workers Union, Local 65* v. *Douds* (S.D.N.Y.), 22 LRRM 2276.

There is attached to this brief, as Appendix II, a letter by Professor Zechariah Chafee which makes it clear that lurid instances of alleged harmful activity by those holding the proscribed political views hardly serve to justify restraints of the type here involved. Random and unparticularized charges that those harboring the proscribed views foment industrial strife and thus threaten our security are hardly of sufficient weight to substitute for the burden of justification which the statute exacts. Fundamentally, this is a statute which owes its existence to hysteria and draws for its justi-

fication on fear rather than fact. The fundamental assumption of the statute is a cynical and irresponsible one, namely, that the members of labor organizations are incapable without coercion of choosing patriotic leaders who will serve their legitimate interests.

It is a gratuitous insult to the American labor movement to suggest, as the Board necessarily must in support of the statute, that labor organizations are so easily subject to manipulation for illegitimate purposes or that workingmen are so stupid and naive that they can be led into action which has a seditious purpose by the mere presence of a Communist, or someone in some vague way associated with Communists, among the officers of the local or national organization. American labor organizations are democratic institutions, democratically operated, and the American workingman, to use the words of Justice Jackson, is fully capable of being his own "watchman for truth"; he does not need and does not trust "any government to separate the true from the false" for him (see *Thomas* v. *Collins, supra,* at p. 545).

CONCLUSION

Section 9 (h) is the most severe provision of a severe statute, the Labor-Management Relations Act, 1947. The section invades constitutional rights of union officers and union members to engage in political activity. A statutory plan which results in a conglomerate of other encroachments upon basic rights adds to the constitutional defects.

Section 9 (h) goes farther than any previous statutory attempt to suppress the freedoms guaranteed by the First Amendment. Section 9 (h) is an attempt to restrict freedom of belief.

Intrusion upon freedom of belief is so contrary to our constitutional scheme and our legal traditions that it was inevitable that the statute pile one constitutional infringement upon another in its attempt to make the restriction effective.

Because belief without more is not proof of activity, it was necessary to draft Section 9 (h) in the form of a bill of attainder, by which a legislative declaration of guilt was made as to individuals and groups.

Because subjective belief is most difficult to ascertain and because the beliefs of individuals are not easily classified into rigid compartments, the statute necessarily sets up indefinite, vague and all-inclusive categories.

Because belief is not subject to objective proof, the individual's innocence was made to depend upon his non-association with others and an expurgatory oath was devised.

Finally, whether because of doubt as to the constitutionality of a direct ban, or for other reasons, a plan was devised whereby pressures, involving loss of fundamental rights, were imposed on third parties to force them, in turn, to impose sanctions upon holders of the proscribed beliefs.

The statute violates all of our constitutional traditions as to the relations of the government and individual. It violates those standards of fair dealing which are the bases of our constitutional guarantees. It requires the rapid and decisive condemnation of this Court.

Respectfully submitted,

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APPENDIX I

June 16, 1948

Honorable Alexander Wiley
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C.

My Dear Senator:

This is in response to your request for the views of this Department relative to a bill (H.R. 5852) "To protect the United States against un-American and subversive activities."

Section I of the bill would provide that the measure may be cited as the "Subversive Activities Control Act, 1948."

Section 2 would set forth the findings of various congressional committees to the effect that the "world Communist movement," under the direction and control of the Communist dictatorship of a foreign country, is a world-wide revolutionary political movement whose purpose is, by subversive or any other means, to establish a Communist totalitarian dictatorship through the medium of a single world-wide Communist political organization. The findings would also declare that the recent successes of Communist methods in other countries, and the nature of the world Communist movement itself, present a clear and present danger to the security of the United States, making it necessary for the enactment of appropriate legislation to prevent the world-wide conspiracy from accomplishing its purpose in the United States.

Section 3 would provide definitions of the various terms as used in the bill and criteria for determining whether a "Communist political organization" or a "Communist front organization" comes within the definition of those terms.

Section 4 would declare that it shall be unlawful, punishable by a maximum fine of $10,000 and imprisonment for ten years, for any person to participate in any movement to establish a foreign-controlled totalitarian dictatorship in the United States.

Section 5 would provide for the loss of nationality by any person convicted of violating section 4.

Section 6 would provide that it shall be unlawful for any

member of a Communist political organization to be employed by the United States.

Section 7 would provide that it shall be unlawful to issue a passport to any member of a Communist political organization.

Section 8 would require every Communist political organization and every Communist-front organization to register with the Attorney General within specified times, and to disclose organizational information at the time of such registration as well as at specified times thereafter. In addition to information which would be required of both organizations in common, a Communist political organization would be obliged to disclose the names and addresses of its members in its registration statement. However, both types of organizations would be required to maintain accurate records of the names and addresses of their members. In case of the failure of any organization to register in accordance with the measure, it would be the duty of the executive officer and the secretary of such organization to register in behalf of the organization.

Section 9 would provide for the maintenance in the Department of Justice of a "Register of Communist Organizations," which would contain a listing of the organizations registered under the bill and be open for public inspection. The section would also require the Attorney General to submit to the President and to the Congress annually, or when requested by either House by resolution, a report with respect to the execution of the provisions of the measure and related data.

Section 10 would provide that it shall be unlawful for any person to become or remain a member of any organization if (1) there is a final order of the Attorney General requiring such organization to register under section 8 as a Communist political organization, (2) more than 120 days have elapsed since such order became final, and (3) such organization is not registered under section 8 as a Communist political organization.

Section 11 would provide that it shall be unlawful for any organization registered under section 8, or with respect to which there is a final order of the Attorney General requiring it so to register, to transmit in the mails or interstate commerce any publication intended to be disseminated among

two or more persons, unless such publication and its container are labeled as disseminated by a Communist organization; or to broadcast any matter over the radio unless preceded by a statement that it is sponsored by a Communist organization. In each instance the name of the organization would precede its identification as a Communist organization.

Section 12 would deny Federal income tax deductions for contributions to or for the use of any organization registered, or required by order to register, under section 8; and would deny such organization exemption from Federal income tax.

Section 13 would provide that whenever (1) the Attorney General has reason to believe that an unregistered organization is a Communist political organization or a Communist-front organization (or he is requested by resolution of either House of Congress to investigate whether an unregistered organization is within either of these classifications); or (2) he receives from any registered organization an application to be relieved from its classification as such, accompanied by evidence which makes a prima facie showing that the organization is neither a Communist political organization nor a Communist-front organization, it shall be the duty of the Attorney General to institute a full investigation to determine whether the organization is in fact a Communist political organization or a Communist-front organization. The section would provide further, however, that the Attorney General shall not make such a determination without first affording the organization an opportunity for a public hearing. The section would also provide for the attendance of witnesses and production of evidence at the place of hearing.

Should the Attorney General determine that the unregistered organization is within one of the designated classifications, he would make a written report containing his findings, and issue an order requiring the organization to register in accordance with section 8. Should he determine that a registered organization is not within one of the designated classifications, he would make a written report containing his findings, and cancel the registration of such organization.

Section 14 would provide for judicial review of an order issued by the Attorney General pursuant to section 13. Find-

ings of the Attorney General would be conclusive if supported by a preponderance of the evidence.

Section 15 would provide the following penalties: A fine of not less than $2,000 nor more than $5,000 for failure to register or file an annual report as required by section 8, except when such failure is on the part of an officer of the organization, in which case it would be not less than $2,000 nor more than $5,000 and/or imprisonment for not less than two years nor more than five years (each day of failure to register in response to an order would constitute a separate offense in either instance); a fine of not less than $2,000 nor more than $5,000 and/or imprisonment for not less than two years nor more than five years for making any false statement, or omitting any statement which is required or necessary to make information not misleading, with respect to a registration statement or annual report filed under section 8; a fine of not more than $5,000 and/or imprisonment for not more than two years for a violation of any provision of the bill for which no penalty is otherwise provided for in section 4 or 15.

Section 16 would provide that nothing in the bill shall be construed to make the Administrative Procedure Act inapplicable to the exercise of functions or the conduct of proceedings under the bill, except to the extent that the bill affords additional procedural safeguards for organizations and individuals.

Section 17 would provide a separability clause with respect to the validity of the bill and its application.

The bill represents two distinct statutory efforts—one directed to the prohibition and punishment of subversive activities as such, and the other a registration statute calculated to effect disclosure of the identity and propaganda of individual Communists and Communist organizations. Within this framework there have also been incorporated certain other regulatory provisions relating to the general problem. The subversive activities and registration sections of the bill cannot, from a legal standpoint, be separated, but must be judged as a whole. A failure to register under section 8 subjects the organization and certain of its agents to severe penalties. On the other hand, any organization registering as a Communist organization pursuant to section 8 would admit that it is under

the control of a foreign controlled totalitarian dictatorship. Such an admission may render it and its members immediately liable to the penalties of section 4.

Therefore, the measure might be held (notwithstanding the legislative finding of clear and present danger) to deny freedom of speech, of the press, and of assembly, and even to compel self-incrimination. Cf. *United States* v. *White,* 322 U.S. 694. Discussing these constitutional guarantees, the Supreme Court has said in *West Virginia State Board of Education, et al.* v. *Barnette, et al.,* 319 U.S. 624, 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

From the language of the bill, it appears uncertain whether mere membership in a Communist organization, as defined in section 3, would constitute a violation of section 4. The principle that a criminal statute must be definite and certain in its meaning and application is well established; a principle which may not be satisfied by the definitions and criteria of the bill. *Connally* v. *General Construction Company,* 269 U.S. 385; *Lanzetta* v. *New Jersey,* 306 U.S. 451.

It is also doubtful whether or not this proposal will meet the requirements of due process under the Fifth Amendment. A statute which would define the nature and purposes of an organization or group by legislative fiat is likely to run afoul of the due process requirements. *Manley* v. *State of Georgia,* 279 U.S. 1 (1929).

The foregoing should not be construed as disapproval of the principle of registration. Application of the principle to some areas of activity is sound and wholesome. Cf. *Bryant* v. *Zimmerman,* 278 U.S. 63. On the basis of past experience with the groups affected by the measure, however, the Department is inclined to believe there would not be any voluntary registrations under the measure. Should a Communist organization fail to register, the burden to proceed would shift to the Attorney General who would then be called upon to employ the administrative provisions of the bill to prove that the organi-

zation is required to register. Under the Act, the Attorney General's action, if successful, would result in the issuance of an order requiring the organization to register. Thereafter, in the event of its registration, activity in its behalf would appear to be proscribed under section 4. Should the organization still refuse to register, membership in it would constitute a crime under section 10 as well as possibly section 4. In summary, the effect of the bill would be to require Communists either to avoid its application altogether, i.e., by refraining or professing to refrain from any activity forbidden by the bill, or be outlawed and subject to prosecution. It can be assumed that no organization would confess guilt by registration and all would deny any activity condemned by the bill.

Outlawing of the Communist Party appears to this Department to be unwise, even if doubts as to the constitutionality of such a step were removed. Outlawing would materially increase the Department's problem of law enforcement. Whereas the Communist Party, to some extent, now operates on the surface, if this bill becomes law it will be forced underground where surveillance of its activities will become increasingly difficult. Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation of this Department, in his testimony before the House Un-American Activities Committee in March 1947, admonished that he "would hate to see a group that does not deserve to be in the category of martyrs have the self-pity that they would at once invoke if they were made martyrs by some restrictive legislation that might later be declared unconstitutional."

The Department deems it also advisable to point out that the public hearing and additional investigative features of the bill, aside from requiring a tremendous expenditure of manpower and funds of doubtful return, would very likely afford Communist organizations an excellent sounding board at the taxpayers' expense.

In my testimony before the Subcommitte on Legislation of the House Committee on Un-American Activities on February 5, 1948, I suggested eight steps whereby the objective of isolating subversive movements in the United States from effective interference with the body politic might be achieved, and

made some suggestions to strengthen existing legislation to assist in carrying out those steps (pages 22 to 24, Hearings before the Subcommittee, February 5, 1948). I adhere to those suggestions. At the same time, I do not believe that sweeping new legislation of this type is required.

Whether the bill should be enacted in the light of the foregoing considerations presents a question of legislative policy. However, the Department of Justice, for the reasons stated, is unable to recommend its enactment.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

TOM C. CLARK
Attorney General

APPENDIX II

Law School of Harvard University
Cambridge, Mass.

May 28, 1948

Hon. Alexander Wiley,
Senate Judiciary Committee,
Washington, D. C.

Dear Senator Wiley:

It is very gratifying that your committee is holding hearings on H.R. 5852, the so-called Mundt-Nixon bill. I am sorry that I have to go to the hospital this afternoon for an operation, or I would send you a much more extensive memorandum on this bill. As it is, I can only ask leave to file with you a few reasons why I feel strongly that the bill should be dropped.

My main reason is that I see no evidence whatever for the necessity of such an unprecedented conglomeration of elaborate regulations of the opinions of private citizens and exceedingly drastic penalties for entirely novel offenses. We already have on the statute books the Smith Act of 1940, with severe penalties for membership in any organization which urges the overthrow of the Government by violence. There are no reported convictions of Stalinite Communists under this act, and so far as I know no such Communist has been thought deserving of prosecution. (The sole reported case involved a Trotskyite labor union; *Dunne* v. *United States* (138 Fed. (2d) 137).) Second, I know of no reported case of a Communist spy, and the paper has reported no prosecutions or arrests of such spies. (Since Gorin was arrested in December 1938; 312 U.S. 429.) Although the activities of such spies in Canada show that they can take place, there is no indication that such activities have occurred or are occurring in the United States. In the third place the Un-American Committee of the House of Representatives spent many thousands of dollars of the taxpayers' money investigating the motion-picture industry. The results of this long investigation were presented by the committee at its hearings last winter. Although I followed these hearings carefully, I did not see a statement that a

single person in the United States was doing anything dangerous to our Government. It is true that three or four writers have since been convicted for refusing to say whether they were Communists. This may go to show that the committee unearthed a few Communists in the motion-picture industry. It wholly fails to show that they or anybody else "present a great and present danger to the security of the United States and to the existence of free American institutions," as section 2 (11) of the bill avers. If there were really a great danger to our Government and our freedom from Communists in the United States, surely there would have been somewhere or other an outburst of unlawful acts or at least tangible evidence of an unlawful conspiracy.

I fully recognize that the Communist Party in Czechoslovakia was a danger to the freedom of Czechoslovakia, and the same is probably true of Italy and other countries. It does not follow that the inclusion of less than one-tenth of 1 percent of our population in a Communist Party here is a real danger to our institutions and our freedom under the very different conditions in this country. We have a very strong Government equipped with existing legislation and efficient Federal police. Our Government does not need any such novel bill as this in order to deal effectively with any actual conspiracy against its existence or any actual effort toward violent revolution. Where inside this country are the facts which justify the establishment of unheard-of regulatory machinery, the expenditure of large sums of money in its operation, and the severe punishment of American citizens because somebody or other has not filled out a piece of paper?

It is now nearly 30 years since my work as a student of freedom of speech led me to pay considerable attention to the activities of Communists in this country. Although I still dislike them very much, it is my considered opinion that they are far less dangerous today than they were in 1919-1920, soon after the Russian Revolution. During those early years that revolution was to many Americans the symbol of a better world. It was assumed to be a heaven on earth. To many idealists it at last appeared possible that men might build a fruitful society without having to seek their own profit. Few

of those who now dream of a city of God can ignore the ugly facts in Moscow. Radicals of my acquaintance who used to speak of Russia as a land of hope are now reduced to saying that it is no worse than any other country. Also social and economic conditions in this country have vastly improved since 1919. The reasons for revolutionary discontent which then existed have greatly been lessened by the legislation under Mr. Roosevelt, the high wages paid during the war and since the realization that Americans of every sort fought and suffered side by side during the war. The national health is far better than in 1919. We have an immunity to revolutionary radicalism far greater. After the First World War drastic Federal legislation was proposed but not passed. The years that followed proved that we did not need it. In some States there were outbursts of suppression which are now regretted. Yet at that time there were tangible evidences like the bomb exploded near the Attorney General's house. If we could get along safely without anything like the present bill in 1919-20, we certainly have no cause for such legislation today.

Turning to the bill itself, I find it has two aspects. First, it sets up an administrative machinery for registration. It does not, however, require all political organizations or all organizations which are somehow associated with politics to register. It practically allows one man, the Attorney General, to single out particular organizations that must register. Although there is an eventual judicial review, the obligation to register is apparently not suspended in the event of an appeal from a ruling of the Attorney General. In view of the serious consequences to an organization from his ruling that it must register, it is important to notice that he does not have to decide that the organization is controlled by a foreign government or is an instrumentality of the world Communist movement. It is enough under section 3 that he thinks it reasonable to conclude that the forbidden conditions exist. He does not have to conclude that they do exist.

In connection with the requirement of registration, it is important to observe that we now have two statutes which require anybody who acts as the agent of a foreign government and any organization subject to foreign control which

is engaging in political activity to register (22 U.S.C.A., secs. 233-233G; 18 U.S.C.A., secs. 14-17). If Communist organizations are now so closely affiliated with the U.S.S.R. as the advocates of this bill seem to urge, then the Attorney General should invoke the two statutes I have cited. The fact that these two statutes have not been used against American Communists indicates that the connection with the foreign government is much more tenuous. The new bill is capable of reaching organizations where this connection is very conjectural. The willingness of certain governmental people to condemn a desirable organization on the basis of very thin evidence is shown by Professor Gellhorn of Columbia in his article in 60 Harvard Law Review 1193 (October 1947), relating the wholly unfounded condemnation of the Southern Conference for Human Welfare by the Un-American Committee of the House of Representatives. This is the sort of organization which might be very well forced to terminate very useful activities by being required to register as a Communist-front organization under section 3 (4) of the bill.

The bill is much more than a registration measure, although it is sometimes represented to be merely that. It imposes many serious penalties upon the expression of opinions and upon membership in organizations which are stigmatized because of their opinions. First, section 4 has no connection with the registration requirements. It punishes any sort of participation in the novel and very vague crime of establishing a totalitarian dictatorship in the United States. Whatever this crime means, it goes far beyond the speech which is punishable under the Smith Act. The statute of limitations does not apply, so that a mature man can be punished for what he did as a college student. Furthermore, in view of the definition of a Communist political organization in section 3 (3), it seems very possible that any active participant in such an organization is guilty of the vague crime which is punishable under section 4. If the organization does not register, its officials can be sent to prison for 5 years under section 15. If it does register, then they may very well make themselves liable to 10 years in prison under section 4. In other words, the registration provisions virtually compel them to confess

their own guilt of attempting to establish a totalitarian dictatorship.

The second penalty is exclusion from Federal employment. This includes teaching in the Washington public schools. Employees and prospective employees who are open to any possible suspicion will be penalized without any trial. They will be deprived of employment because the official responsible for their employment will want to be on the safe side in order to avoid going to prison themselves, under section 6 (b). Observe that he does not have to know that a prospective employee belongs to a forbidden organization. It is enough that he believes it even though his belief is wrong and unreasonable.

The third penalty is that the member of a forbidden organization cannot get a passport, under section 7.

The fourth penalty is that the use of the mails and interstate commerce is subject to a burdensome limitation under section 10. For example, if the Attorney General should be persuaded by the Un-American Activities Committee to share its views about the Southern Conference for Human Welfare, that organization would have to describe itself on all its publications as a Communist organization. This novel stigma recalls the practice of medieval princes to require Jews to wear special marks on their coats.

Therefore in view of these penalties, the question is not merely whether American Communists should be obliged to register. The question is whether American citizens who have not been proved to be dangerous individuals should be made liable to heavy fines and long prison sentences, in large measure because of the activities of other people. A good deal of the bill creates guilt by association. See the article on this subject by John Lord O'Brian in 61 Harvard Law Review 592 (1948).

In this statement I have not gone into questions of constitutionality. The main question before your committee is the wisdom of this bill and not its validity. Such an extraordinary measure can be justified only by a tremendous danger within our Nation. Are these novel penalties, is this novel machinery, required to save the country? It is not enough that Communists are pestiferous people or indulge in big talk about

taking over our Government. The question is whether they are within a million miles of doing so. Jefferson said in 1801: "I believe this is the strongest government on earth." Because I confidently share his belief, I hope very much that your committee will reject this unheard-of bill.

Sincerely yours,

Z. CHAFEE, JR.

No. 11919

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioners,

vs.

O'KEEFE AND MERRITT MANUFACTURING COMPANY AND L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., AND WILBUR G. DURANT, Individually and as Co-partners, Doing Business as PIONEER ELECTRIC COMPANY,

Respondents,

and

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C.I.O., and PHILLIP MURRAY, Individually and as President of the UNITED STEELWORKERS OF AMERICA, C.I.O.,

Intervenors.

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENTS.

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Intervenors.

BRIEF OF RESPONDENTS.

Preliminary Statement.

The record in this case was made almost three years ago. [R. I., 220.] Exactly one month prior to the start of the hearing, on February 6, 1946, the C. I. O. had filed a Charge with the Board office for the Twenty-first Region in Los Angeles which referred back to a Board-conducted election on November 20, 1945 [R. I., 1]; determination of representatives pursuant thereto was dated November 20, 1945.

As stated in Petitioner's Brief on pages 4 and 5, O'Keefe and Merritt, the corporation, and Pioneer Elec-

tric, the partnership, had been operating since 1920 and 1942 respectively, each with a substantial force of employees, and each doing a business of approximately $2,000,000 per annum [R. III, 1268], in contiguous portions of the same factory premises in Los Angeles. The election, as always, followed the filing of a representation petition with the Board, and it is apparent that, at some time prior to the election, someone had had to make a decision as to which employer to name in that petition.

The Charge recites glibly that the election determined and the Board certified the C. I. O. as the representative of the production and maintenance employees of both the corporation and the partnership. [R. I, 1.]

But at the time the Charge was written the prior decision above mentioned had predicated a far different result. The difficulty so created was not alone for the C. I. O. in drawing the Charge. It carried over to the Board in drawing the Complaint and the Amended Complaints, the findings in the Trial Examiner's Intermediate Report, and the findings in the Decision and Order of the Board. In each of these the Board has attempted to maintain the inevitable *non sequitur* which attempts are, in our view, conspicuous both for their ingenuity and their lack of success.

The facts are in the record. Since the record as a whole does not support either the Board's findings nor Statement of the Case in its Brief, we would like to run over them, using the same abbreviations as have been used by the Board.

Though it is hard to deduce from anything filed anywhere by the Board, the statement of the Charge referred

to above is wholly untrue. As to representation of the employees of the corporation *and* the copartnership:

1. The C. I. O. never petitioned for it. [R. II, 750.]

2. The A. F. of L. never consented to it. [R. III, 973.]

3. The Board never gave notice of any such election. [R. III, 1221.]

4. The Board never procured any employee lists of both firms. [R. III, 1217, 1218.]

5. The tally of ballots shows that no such election was ever held. [R. III, 1226.]

6. The consent determination of representatives does not purport to effect any such result. [R. III, 1230.]

7. The certification on conduct of election refers to no such election. [R. III, 1002.]

In the face of the obvious fact that both the C. I. O. and the Board avoided wholeheartedly and at all times the commission of any act or acts which might effect or tend in any way to effect a determination of bargaining representatives for the partnership, the Pioneer Electric Company, we find the Board saying in the Complaint, Paragraph 8 [R. I, 7], that the election of November 20, 1945, *from which Pioneer Electric Co. and its employees were purposely excluded* [R. II, 912, to R. III, 913 to 947, inclusive—testimony of the C. I. O. leader, John Despol—after a recess he attempted to change this testimony to the effect that he had confused Pioneer Electric with a trucking company R. III, 948, *et seq.*], determined representatives for the partnership, Pioneer Electric.

The first amended charge [R. I, 22] repeats the statement that the election determined representatives for the partnership as well as the corporation. The Amended Complaint [R. I, 12] alleges in Paragraph 8 that the election determined representation for the corporation only, but in Paragraph 9 charges both the corporation and the partnership with refusal to bargain with the C. I. O.; elsewhere the Amended Complaint attacks the A. F. of L. contract as having been made when the A. F. of L. was not the duly designated exclusive bargaining agent of "respondents" employees. This contract was dated in February, 1946. [R. I, 19.]

The Second Amended Complaint [R. I, 24] is dated February 20, 1946, but appears to have been filed March 13, 1946, one week after the start of the hearing, which was on March 6, 1946. Its date is also one day before the date of filing of the First Amended Charge, February 21, 1946. Like the first Amended Complaint, entitled and sometimes called herein "Amended Complaint," it charges that the election affected the corporation only, but that "respondents," meaning the corporation *and* the partnership, have refused to bargain with the C. I. O., and that "respondents" have coerced their employees and entered into the A. F. of L. contract when the A. F. of L. was not the duly designated bargaining representative of "said employees." This document, like the previous complaint, describes the proper bargaining unit as consisting exclusively of O'Keefe and Merritt employees, *i. e.*, employees of the corporation only.

The Trial Examiner, in his Intermediate Report, was faced with a record which showed that the partnership, from its inception in 1942, had been at all times conducted

as a separate entity in all respects. "In all respects" means everything from Social Security accounts to Workmen's Compensation insurance. [R. III, 1261-1265.] There was an entire absence of evidence from which the two respondents could be coupled as general and special employer with respect to the employees of either. The record did show a transfer of approximately 300 employees from the corporation to the partnership about January 31, 1946. [R. I, 72.] The eligibility list for the election, composed entirely of employees of the corporation, numbered 341. [R. I, 75.] Confronted with this situation the Trial Examiner concludes that the corporation and partnership "are jointly employers of the employees here involved" and recommends that the C. I. O. shall receive the right to bargain for the partnership employees and that all of them, those coming to the partnership on January 31, 1946, and those who were employees before that time, shall be divested of their contract with the A. F. of L.

In the Decision and Order of the Board [R. I, 176] the majority does not find joint employment but "that there is a considerable community of interest between the two respondents." "* * * the burden was upon the respondents to separate the two, viz., to show that the lease and transfer would in any event have taken place absent the illegal motivation." [R. I, 180.]

The minority opinion noted the following significant facts: 1. That as early as 1944 the C. I. O. was debating whether to include the partnership in the unit. 2. That in their 1945 petition the C. I. O. sought a unit of corporation employees only. 3. That the election was held in a reconversion period which returned production to the article already under pre-war boycott by the A. F.

of L. 4. "It is conceded that one of the reasons for the transfer was that under O. P. A. regulations the partnership respondent could obtain higher prices for its products because it was a new producer in the field." [R. I, 186, 187.]

In view of our contention, made heretofore to the Board, that the uncorroborated evidence of Charles Spallino is insufficient as substantial support of a finding, we desire to examine petitioner's account of his first meeting with Daniel O'Keefe. (Petitioner's Brief, 7.) Petitioner states that on this occasion Charles Spallino and Lovasco "were in the office of Daniel O'Keefe, president of the corporation." Quite true, and they were there at Charles Spallino's instance. [Testimony of Lovasco, R. IV, 1535.] According to Charles Spallino, Daniel O'Keefe said that in the event he had to make a choice he would favor the A. F. of L. and directed them to Cecil Collins, attorney for the corporation. But according to Lovasco, who was there, Daniel O'Keefe never mentioned Collins' name [R. IV, 1537], and told them to keep their noses clean.

Next in order, Petitioner's Brief has the two men in Cecil Collins' office a few days later. Charles Spallino testified to this meeting as set forth in Petitioner's Brief, page 8, but according to Lovasco, nothing occurred except that Collins refused to help Charles Spallino write a speech. [R. IV, 1538-1542.]

Next, Petitioner's Brief tells of Charles Spallino meeting Roberts of the Stove Mounters, A. F. of L. and trans-

acting business concerning signature cards. Their activities have one significance in view of Charles Spallino's testimony that Cecil Collins knew about them, but quite another in connection with Lovasco's testimony that they were unknown to management of either the corporation or the partnership. [R. IV, 1542.]

There is sufficient evidence that Charles Spallino was a C. I. O. agent, both at the time he was pretending to organize for the A. F. of L. and at the time he testified in the hearing of this case.

> "Like I said before, in the past we fought labor unions of all kinds. We didn't have to have any unions. Then came the decision on having the labor union. We decided which one we wanted. I got the one I wanted, and I am sticking by it." [R. III, 1260, testimony of Charles Lovasco.]

At the time of these pretended A. F. of L. activities with alleged connivance of management, Charles Spallino was passing out C. I. O. literature in the toilets. [R. III, 1252-1260.]

There is evidence that Charles Spallino was connected with the C. I. O. at the time of their original organizing drive in 1944. [R. II, 596.]

His own testimony characterizes him as a hypocrite:

> "Q. (By Mr. Collins): Mr. Spallino, were you at any time in good faith working for the A. F. of L.?
> (Objections overruled.)
> A. Not in good faith, no." [R. II, 604.]

Returning to Petitioner's Brief: In connection with these alleged organizing activities of Charles Spallino which he says were not in good faith, petitioner recites that he made a demand for an increase in salary. He was visiting various departments during working hours, and the record shows that this was required as the Christmas season approached in connection with his regular duties as president of the social Five and Over Club. [R. II, 575.] In this connection Petitioner's Brief, page 11, cites the following significant quotation, ascribed to Cecil Collins: "If you want to better yourself, you are working with * * * (the plant superintendent) there, he could easily give you a nickel or a ten-cent raise." [R. II, 490.] Why this ponderous attempt by deletion to leave the impression that Cecil Collins was talking about a managerial bribe instead of a mere brotherly favor? The name deleted is that of Joe Spallino, the witness' brother.

Next, Petitioner's Brief has Charles Spallino and Lovasco going to Daniel O'Keefe and submitting "to him for approval a pro A. F. of L. document evidently inspired by Collins." This is the document which Lovasco testified Collins had refused to inspire, and the authorship of which he ascribed to himself and Charles Spallino. When the speech was taken to Daniel O'Keefe, one thing is clear from all accounts—he promptly threw it in the waste basket. [R. IV, 1538.]

Next come the speeches. As to the content of these there is no question, and all of them, the three by Daniel

O'Keefe and the one by Cecil Collins, are in the record. They are distorted in Petitioner's Brief.

As to the speeches before the Five and Over Club on or near the day of the election there is no evidence they were inspired by either management, either union, nor that those attending were paid for their time by anyone. Charles Spallino merely testified no deduction was made in his own pay, which is not surprising since it is clear from the record that he generally pursued all his duties as president without deduction for the time spent. Certainly a part, and perhaps all, of the corporation's employees were off work at the time of the meeting. No mention is made in the record of the partnership employees. [R. II, 510, 511, 512.]

As to the bargaining relations between the corporation and the C. I. O. after the election, Despol, the C. I. O. leader, admitted his error in excluding the partnership from the election [R. IV, 1544, 1545] threatened Lovasco with dire consequences. [R. IV, 1543.] It was only about a month before the transfer and lease between the corporation and the partnership, and there were several meetings during this period, necessarily inconclusive, and after the transfer Despol would not continue unless the corporation bargained for the partnership employees. [R. IV, 1558 *et seq.*]

ARGUMENT.

It is the position of respondents that no substantial evidence of unfair labor practices is in the record aside from the speeches. That these speeches do not violate the Act. That the order with modification as requested by the Board is not justified in view of the position of the C. I. O. on compliance, and that its entry would merely permit the C. I. O. to bargain with the Court *re* compliance. That there is no foundation for entry of an order against Pioneer Electric and no due process as to certain of its partners.

I.

NO JURISDICTION WAS ACQUIRED BY THE BOARD AS TO CERTAIN RESPONDENTS.

II.

PIONEER ELECTRIC WAS AT ALL TIMES A SEPARATE ENTITY NOT AFFECTED BY ANY DETERMINATION OF REPRESENTATIVES AND NO ORDER SHOULD BE MADE AGAINST IT OR ITS CONTRACT.

III.

THE ONLY PROPER RESPONDENT EMPLOYER WAS NOT GUILTY OF UNFAIR LABOR PRACTICE.

IV.

SECTION 9(H) OF THE ACT, AS AMENDED (29 U. S. C. A., SECTION 159(H)), IS CONSTITUTIONAL.

V.

IF ANY PORTION OF THE ORDER BE ENFORCEABLE, THE BOARD'S REQUESTED MODIFICATION THEREOF IS TOO LIMITED IN SCOPE.

POINT I.

No Jurisdiction Was Acquired by the Board as to Certain Respondents.

Clearly, an order of the Board, to be valid and enforceable, directing an individual to do or not to do certain acts, must be based on jurisdiction over the person of such individual. To enforce such an order as to such an individual would contravene and be contrary to the due process of law clause of the Fifth Amendment of the United States Constitution in the absence of acquisition by the Board of personal jurisdictional over that indivdual.* Petitioner makes no contrary contention but does contend that personal jurisdiction was had as to each respondent and therefore that the order validly may be enforced against each. In support of this contention, the Board argues that jurisdiction was had over the person of each individual both by service in accordance with Section 11(4) of the Act (29 U. S. C. A. Sec. 161(4)) and by general appearance entered on behalf of each. (N. L. R. B. Brief, pp. 88-92.) The arguments made are submitted to be without support.

The Act provides for several methods of service among which is service by registered mail. The latter was the method attempted by the Board. In the absence of general appearance, proof of service by this means requires

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*No contention is made by respondents that jurisdiction was not had over the corporation and over the partnership. The order, however, purports to run against each partner as an individual though certain were never properly served with requisite notice.

affidavit by the individual making the service and a return post office receipt. This dual requirement obviously is for the purpose of showing actual receipt by the named individual of the required notice, etc., so as to acquire personal jurisdiction and afford that individual an opportunity to be heard and to defend. Otherwise due process of law is not had and fundamental constitutional requirements are violated. (*Powell v. Alabama,* 287 U. S. 45, 68.)

Signature upon the return receipt by the very individual involved probably suffices to establish actual receipt by that individual of the requisite process to acquire jurisdiction and respondents here make no claim to the contrary. However, as admitted by the Board (p. 89), certain of the return receipts here were signed, not by the individuals involved, but by some third person. Though the Board characterizes the actual signer in such case as the "agent" of the individual intended to be served, there was and is nothing to substantiate this assertion. May personal jurisdiction be acquired in this unreliable way?

For example, in the case of respondent Jenks, she had moved to Hawaii where she was working at the time process was delivered by mail and signed for in Los Angeles, California. The return post office receipt was signed, not by her, but by some third person. She was not served with nor did she receive any notice personally. Surely, Congress did not intend that a return receipt, signed by a third person and not by the party, would establish and support personal jurisdiction over the party. The

fundamental right to notice with opportunity to appear and defend before any determination of the party's valuable rights and privileges cannot thus be taken away without constituting a denial of due process of law. The individual respondents, such as respondent Jenks, who were not served in conformity with requirements of due process of law, cannot be said to be bound by the Board's order here petitioned to be enforced. As to such respondents, the order is a nullity.

The Board contends that any defect in service was cured by general appearance. On the opening day a week's continuance was ordered of the hearing, no testimony being taken. At that time, the Trial Examiner asked all counsel to state orally the appearances for his benefit. At the same session, Mr. Collins informed the Examiner that the continuance would enable him to contact the individuals ("clients") "and see whether I represent them and find out who I represent" [R. I., p. 272], having previously informed the Examiner that some had not yet been served. [R. I., p. 254.] Certainly, these oral statements cannot be said to constitute any general appearance by those individuals who had not been served and who had not even had opportunity to converse or confer or even contact counsel. A week later, at the outset of the day to which continuance had been had, Mr. Collins informed the Examiner that he had been unable to communicate with respondent Jenks and with other respondents, that he did not know which ones had been served, and that he was not

purporting to appear for or represent any respondent who had not been served but only such as had been served. [See R. I., pp. 286-290.]

The Board also refers to the written answer filed as constituting a general appearance by the corporation, partnership and each individual partner. This pleading is entitled "Answer of Respondents" and commences with "Comes now the respondents in the above-entitled matter, and, for answer to the complaint, first amended complaint and second amended complaint on file herein, admit, deny and allege as follows" [R. I., p. 38.] Where there are several defendants, a pleading filed for "defendants" generally, without naming them, constitutes an appearance only for those who have been served with process and does not constitute an appearance for defendants not so served. (*Swafford v. Howard,* 20 Ky. L. 43; *Crump v. Bennett,* 2 Litt. (Ky.) 209; *Mullins v. Rieger,* 169 Mo. 521; *Dougherty v. Shown,* 1 Helsk. (Tenn.) 302; *Williams v. Neth,* 4 Dak. 360; *Correl v. Grieder,* 245 Ill. 378; *Phelps v. Brewer,* 9 Cush. (Mass.) 390; *Heavrin v. Lack Malleable Iron Co.,* 153 Ky. 329; *Merced County v. Hicks,* 67 Cal. 108. *Cf. Thompson v. Cook,* 20 Cal. 2d 564.)

The order of the Board is invalid and cannot be enforced as to those respondents, such as respondent Jenks, over whose person no jurisdiction was secured.

II.

Pioneer Electric Was at All Times a Separate Entity Not Affected by Any Determination of Representatives and No Order Should Be Made Against It or Its Contract.

The petitioners, in their brief, have relied upon a number of cases based upon factual situations unlike the one in the present case. The partnership respondent was a bona fide firm, in existence since 1942. It engaged in the manufacture of war materials, as a sub-contractor, during World War II, had its own employees, and was a distinct, separate legal entity from the corporation. Nowhere does the record show it was an organization formed as a subterfuge by the corporation for the purpose of refusing to negotiate with the C. I. O.

The petitioners have relied upon cases in which corporations have made changes and/or mergers "in name only." But here the record shows the contract between the corporation and the partnership had been in contemplation between the contracting parties long before the consent election and no "in name only" subterfuge was engaged in.

Where the two organizations are actually separate entities, that the courts will require conclusive proof of actual fraud before reaching the conclusion urged by the petitioners herein is shown by the language of the Circuit Court of Appeals in *N. L. R. B. v. Timken Silent Automatic Co.,* 114 F. 2d 449, where the court says:

> "The motion by the Timken-Detroit Axle Company rests on wholly different grounds. *Although the original respondent was its wholly owned subsidiary,* there is no showing here made which gives sufficient ground for disregarding the separate corporate existence of the two. No control by the parent may

be said to have wronged or defrauded anyone with whom these proceedings are concerned and without proof of that sort of dominance the parent stockholder is not to be treated as one with the subsidiary corporation. (Citing cases.) Nor does an agreement to assume and discharge the obligations of the subsidiary operate as a merger of the two. Whatever rights and obligations may arise from that *fall short of making the two corporations one entity in law and that alone is of present importance.*" (Emphasis added.)

In the cases cited by the petitioners, including *DeBardeleben v. N. L. R. B.,* 135 F. 2d 13; *N. L. R. B. v. Hopwood Retinning Co., Inc.,* 104 F. 2d 302; *N. L. R. B. v. Blair Quarries, Inc.,* 152 F. 2d 25; *N. L. R. B. v. Adel Clay Products Co.,* 134 F. 2d 342; *Southport Petroleum Co. v. N. L. R. B.,* 315 U. S. 100, and others, there was in no instance a merger with a bona fide, pre-existing organization. In no instance do the facts of these cases coincide or even approach the situation of this case, where the partnership has a valid, closed shop contract in effect prior to the transfer of employees from the corporation.

In *N. L. R. B. v. Blair (supra),* cited by petitioners, Blair (who took over the Granite Co.), operated with the same personnel, and "assumed the operation without change of personnel or in manner of doing business." This situation must be clearly distinguished from the case herein where the partnership operated with its own personnel and union contract prior to the transfer.

In *N. L. R. B. v. Long Lake Lumber Co., et al.,* 138 F. 2d 363, the "separate entities" were a lumber company and one Robinson, who had a contract with the company

to log standing timber owned by the company, said contract terminable on thirty days' notice.

The above cases fail to disprove the contention of the respondents herein; that the partnership, as a valid and separate entity, which prior to any of these proceedings had its own employees, working under a contract with the A. F. of L. unions herein, entered into prior to the transfer of employees, is not to be bound by any ruling concerning the corporation, a distinct and independent organization.

POINT III.

The Only Proper Respondent Employer Was Not Guilty of Unfair Labor Practice.

Elsewhere in this brief it is shown that O'Keefe and Merritt Manufacturing Company, a corporation, was the employer as to whose employees the election for exclusive representative was had and that neither the partnership, Pioneer Electric Company, nor the individual partners of the latter as employers or otherwise had any connection therewith and that the choosing of an exclusive bargaining representative, for the employees of the partnership, was never requested nor involved in any election. It is shown that the Board's Order improperly and without right seeks to direct the partnership and individual partners thereof to cease and desist from certain acts and to take other affirmative actions upon the basis and assumption that the election held by the employees of the corporation, O'Keefe and Merritt Manufacturing Company, is to be binding and effective against the separate entity, Pioneer Electric Company, a copartnership, and its individual partners as such. It is shown that the Board's Order properly may bind and affect only the corporation,

its officers and agents. The question thus arises whether the evidence establishes any unfair labor practice by this respondent corporation, its officers or agents.

What constitutes unfair labor practice for an employer? Section 8 of the Act (29 U. S. C. A., §158), both before and after amendment, contains five subdivisions defining this matter. It is provided:

> "It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.
>
> "(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided (proviso not here important).
>
> "(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under sections 151-166 of this title.
>
> "(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

These, then, constitute those matters which, if violated by the employer, would be unfair labor practice.

Mr. O'Keefe, president of respondent corporation, delivered a speech to the employees of the corporation prior to the election. In its brief, the Board has quoted portions of this speech and summarized other portions as establishing unfair labor practice by respondent corporation. The entire speech appears in Volume III of the Record at pages 1087 through 1094. It is filled with statements demonstrating lack of any unfair labor practice. Mr. O'Keefe stated:

> "I realize that selecting a union to bargain for you is your own affair and for this reason, I have not interfered with the activities of the different groups who have been active in organizing for the different unions. However, some of the old timers around here asked me to express my views, inasmuch as they thought I had an opportunity to evaluate the different unions and pass this information along to the men. I suppose that some of you will feel that I am butting in but, after all, I am expressing my opinion and when it comes to voting, the ballot is secret—you can suit yourselves.
>
> "First of all, I can say that I still think all unions are bad—the A. F. of L. as evidenced by the trouble they caused in the moving picture strike—the C. I. O. for the many disturbances they have created in the short period of time they have been in existence, and while there are probably some good men connected with both unions, nevertheless I think a lot of them want to make a living without doing any work themselves. But that is not the issue now. The question for you to decide is which of the two, let's say evils, is the lesser or will there be more benefits from one than from the other."

Mr. O'Keefe then compared the promises which each union had made to the employees during their compaigns, and continued:

> ". . . As you know, the A. F. of L. tried to organize us a long time ago. We opposed it then on the grounds that they did more harm than good. I am not sure today whether or not that is still true, for the reason that I do not know how much trouble they will cause us. However, if they allow you to have your own local and you select the right men to head that local, I believe you can keep some of those who might be inclined to cause trouble from rocking the boat and get along harmoniously without work stoppages, which are a bugbear as well as a loss to management and employees."

Mr. O'Keefe then commented that the company had never been able to do much business in the northern part of the state because the men who connect stoves in that territory belonged to A. F. of L. and stated that "Another reason that I would be partial to the A. F. of L., if I were an employee voting, is the fact that we are so closely identified with the building trades," predominantly A. F. of L. His speech concluded with the following:

> "Now on the ballot there are three places to vote—one for the C. I. O., one for the A. F. of L., and one for neither. I can just imagine that there are a number of you who would be very glad to vote for neither, but I want to ask you as a favor to pass this up and vote for one or the other. The fact that you vote for one or the other does not mean that you will have to join that particular union or any union, but it does mean that you are going to have one or the other in here to bargain for you if you wish to join. And as you know, nobody is going to know

how you vote—we will get along as best we can with whomever you select to represent you, as I believe you will always use good judgment in selecting your representatives. Therefore, again I urge you to be sure and vote."

A reading of the entire speech [R. III pp. 1087-1094] shows there was no unfair labor practice thereby committed. It was an exercise of Mr. O'Keefe's right to freedom of speech. In *Big Lake Oil Co. v. N. L. R. B.,* 146 F. 2d 967, the employer posted a letter to its employees, prior to an election, quite similar in content to Mr. O'Keefe's speech. The Board contended that this was an unfair labor practice. The Court held:

> "We do not agree with the Board that the letter written by petitioner's vice president and general manager to its various employees was coercive. We think the letter was informative rather than coercive, and contained statements that the employer has a right to make. As said by this court in Jacksonville Paper Company v. National Labor Relations Board, 5 Cir., 137 F. 2d 148, 152:
>
> " 'The Act does not take away the employer's right to freedom of speech. The constitutional right of freedom of speech can not be so abridged as to preclude an employer from expressing his views on labor policy or problems so long as such utterances do not, by reason of other circumstances, have a coercive effect on employees.' "

The Board's cease and desist order was enforced, however, because of other activities of the employer which constituted unfair labor practice.

In *N. L. R. B. v. J. L. Brandeis & Sons,* 145 F. 2d 556, is found:

> "It is the contention of the petitioner that notwithstanding the constitutional guaranty of the right of free speech preserved by the First Amendment to the Constitution, respondent as an employer 'had the affirmative duty of maintaining a complete and unquestioned neutrality.' While the teaching of some of the earlier decisions appears to sustain the contention that an employer must be neutral in his attitude in all labor matters and must refrain from expressing his opinion, we think the case of National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, . . . marks a definite departure from that view, and the trend of judicial decision since the Virginia Power Company case supports the view that an employer may disseminate facts within the area of dispute, may even express his opinion on the merits of the controversy even though it involves labor organization, may indicate a preference for individual dealings with employees, may state his policy with reference to labor matters, and may express hostility to a union or its representatives. (Citing many cases.) This right of free speech guaranteed by the constitutional amendment extends to labor matters and the dissemination of facts. (Citing case.) It is only the use of the right free speech in labor matters under such circumstances and conditions as to coerce the will of employees that is forbidden. (Citing cases.)"

The petition for enforcement was denied.

In *N. L. R. B. v. American Tube Bending Co.,* 134 F. 2d 993, the Court also refused enforcement of the Board's Order. In the very recent case of *N. L. R. B. v. Enid Co-operative Creamery Ass'n,* 169 F. 2d 986, the respond-

ent employer posted a notice prohibiting any union discussions or activities whatsoever while on duty. The notice went on to state "we want our employees to know that it is not necessary to belong to any union to work for this Association, neither is it necessary to refuse to belong to a union to work for this Association. This is a question for each employee to decide for himself without pressure or prejudice from the union or the employer." The Board declared this to be an unfair labor practice and sought enforcement of its Order by the Court. In refusing to grant enforcement, the Court held concerning the notice:

> ". . . We can find nothing either overtly or covertly inimical in this statement. *Cf.* N. L. R. B. v. Virginia Electric & Power Co., 314 U. S. 469 . . .; Boeing Airplane Co. v. N. L. R. B., 10 Cir., 140 F. 2d 423; N. L. R. B. v. American Tube Bending Co., 2 Cir., 134 F. 2d 993, . . .
>
> "The course of conduct of the respondent's supervisory employees relied upon by the Board to support enforcement, consists of statements by them to employees during the union's campaign to organize the plant. The statements were made to various employees at their homes, on the street, and wherever they happened to meet. They were undoubtedly calculated to persuade the employees not to join the union. Thus, they were told that they would derive no benefit from joining a union; that the wages they were being paid were higher than the wages paid in similar plants; and that if the employees were unionized they might have to take a reduction in salary; that if they joined the union and failed to pay their dues they would be discharged, and other 'disadvantages' of union membership were pointed out. But,

there is no evidence of any direct or subtle threats of coercion. No one was led to believe that membership in the union would affect his employment in any way, and there is no evidence whatsoever that membership in the union or membership activities prejudiced any employee.

"The Act proscribes interference, restraint and coercion—it does not proscibe 'free trade of ideas.' N. L. R. B. v. Virginia Electric & Power Co., *supra;* Thomas v. Collins, 323 U. S. 516, . . . The Board has a wide latitude in appraising facts and drawing inferences therefrom. It has the primary responsibility for the administration of the Act and to that end, the right and duty to determine when facts constitute unfair labor practices. But we, along with the Board, have the duty to balance the employer's inalienable right of free speech and expression against the right of the employees to freedom of self-organization. See N. L. R. B. v. Continental Oil Co., 10 Cir., 159 F. 2d 326. In that process, we have said that so long as persuasion does not amount to coercion, it is within the guaranty, but that when words of persuasion are uttered by one who holds the power of coercion, it is often difficult to attain the delicate balance between the two. N. L. R. B. v. Continental Oil Co., *supra*. If, however, an employer has the right not only to inform but to persuade to action, see Thomas v. Collins, *supra,* he surely may tell an employee that, in his judgment, it would not be beneficial for him to join a union if he also makes it plain that such employee has a free choice without fear of reprisal.

"Judged by this test, we are convinced that the statements relied upon by the Board are wholly insufficient to warrant enforcement."

The pre-election speech of Mr. O'Keefe under the decisions cannot, it is submitted, be characterized as an unfair labor practice. The Board states that respondent corporation donated the services of two rank and file employees who proselytized for the A. F. of L. Even the statement of facts, somewhat distorted in favor of the Order, contained in the Board's Brief, states that when the "rank and file" employee approached an employee he would tell the latter that they had to join a union, the A. F. of L., "that is that the Company wanted the A. F. of L., *but at election time they could vote the way they wanted.*" (Board's Br. p. 9.) The activities and statements made by the supervisory employees in the *Enid Cooperative Creamery Ass'n* case, *supra,* were far stronger than those here involved. And, as in that case, there here has been no showing that the acts were coercive or contained any threat of force or reprisal or promise of benefit. This being so, the Board cannot successfully uphold its Order upon the premise that the pre-election speech or other activities amounted to an unfair labor practice. And, while not conclusive, it may be pointed out that the employees actually voted for the C. I. O. and not A. F. of L. according to the certification of the Board.

The Board next characterizes a speech, made by Mr. O'Keefe a week after the election, as an unfair labor practice. This speech appears in full in Volume III of the Transcript at pages 1095 through 1105. The Board's Brief deals most unfairly with the spirit and content of this speech. The speech is lengthy and should be read in

its entirety. It was made after the election and hence could have had no effect thereon. It was merely a statement of what the employer could now expect in the way of business dealings under the choice made by the employees and the problems which the result had raised. There was no threat of coercion or reprisal or promise of any benefit. There was an expression of disappointment. But nothing therein, it is submitted, may be characterized as an unfair labor practice.

The Board asserts that respondent corporation, through Mr. Collins, its attorney and labor relations adviser, failed to bargain in good faith with the chosen union after its certification. The facts stated by the Board in its brief are that five bargaining conferences were held (approximately one a week for five weeks) but that Collins endeavored to evade bargaining. The Board states that throughout the negotiations the union sought a "union shop" contract but that Collins was willing to consider only maintenance of membership and check-off provisions. It is clear that the parties were unable to reach a basis and that such is the prime reason for failure to reach an agreement. The Board intimates that the respondent corporation secretly was negotiating with the separate entity, the partnership (concerning which the CIO had failed and refused to include in the election), for a transfer to the latter of its manufacturing facilities. There was no secret concerning this proposed transfer, the union representative being informed that the transaction was pending at the third conference if he was not aware there-

of prior to that time. This transfer was not a spur of the moment transaction but was a bona fide transaction between separate entities as elsewhere shown in this brief. It was not for the purpose of evading or negating the certified union as the bargaining unit for the employees of the respondent corporation.

The respondent corporation has been and still is willing to bargain with the CIO regarding the corporation's employees. However, the CIO refuses to bargain for such employees unless the employees of the separate entity, the partnership, are included. It is submitted that, in the absence of an election by and proper certification of the CIO for the partnership's employees it manifestly is improper for the union to insist upon exclusive representation for such employees. The respondent corporation could not, if it desired, bargain with those who are not its employees.

Finally, the Board refers to a speech made by Mr. Collins, a few days after Mr. O'Keefe's second speech, and to a third one made by Mr. O'Keefe. The former appears in Volume III of the Transcript at pages 1115 through 1117 while Mr. O'Keefe's appears in the same volume at pages 1106 through 1109. It is submitted that neither contains anything which may be characterized as an unfair labor practice as defined in the Act. (See, for example, *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 167 F. 2d 662, quoted and followed in *N. L. R. B. v. Penokee Veneer Co.*, 168 F. 2d 868.)

It respectfully is submitted that the Order of the Board cannot be supported for the reason that no unfair labor practice was proven against respondent corporation.

POINT IV.

Section 9(h) of the Act, as Amended (29 U. S. C. A., §159(h)), Is Constitutional.

The "Brief for Intervenors"—United Steelworkers of America, Stove Division, Local 1981, CIO, and Philip Murray, Individually and as President of the United Steelworkers of America, CIO—is confined to a lengthy and repetitious discussion contending that the statute (Section 9(h) of the Act, as amended (29 U. S. C. A., §159(h)), is unconstitutional. Due to the extremely short time between the receipt of Intervenors' Brief by respondents' counsel and the due date, as extended, of the instant brief, it has been impossible to read and study each of the numerous citations made by intervenors or to fully digest or to give thorough consideration to each of the many arguments advanced in Intervenors' Brief.

Intervenors apparently contend that Section 9(h) is presumed to be unconstitutional for they argue (pp. 68 *et seq.*) that "The burden of establishing that Section 9(h) is constitutional is upon the Board." However, it is settled beyond cavil that a statute, enacted by the Legislative branch of the Government, is presumed to be constitutional, all doubts must be resolved in favor of upholding the statute and in favor of its constitutionality, and no statute will be declared unconstitutional unless and until the one attacking its constitutionality clearly establishes that it contravenes some constitutional provision. (11 Am. Jur., §§128 *et seq.*, pp. 776 *et seq.; Carmichael v. Southern Coal & Coke Co.,* 301 U. S. 495, 509-510; *Helvering v. Davis,* 301 U. S. 619, 640-641.)

Counsel for intervenors, Messrs. Goldberg and Donner, appeared as counsel for certain petitioners in the case of

Inland Steel Co. v. N. L. R. B., C. C. A. 7th, decided September 23, 1948 (cases numbered 9612 and 9634), 170 F. 2d 247, 263-267. (On November 24, 1948, certiorari was applied for by the union—United Steelworkers of America v. N. L. R. B.; and on November 26, 1948, certiorari was applied for by Inland Steel Company —Inland Steel Co. v. N. L. R. B.) Many, if not all, of intervenors' contentions here made were likewise advanced in the *Inland Steel Company* case wherein the Circuit Court of Appeal upheld the constitutionality of Section 9(h). The majority opinion upon the constitutionality of Section 9(h) was written by Kerner, C. J., and concurred in by Minton, C. J. In upholding the statute it was held:

> "The Union's principal contention is that the condition imposed by the Board's order and the Congressional policy embodied in §9(h) which the order effectuates, invade the right to freedom of speech and deny freedom of political belief activity. It insists that §9(h) 'is an attempt to restrict freedom of belief'; that the section 'is primarily if not exclusively a restraint upon opinion and belief,' and that it 'imposes sanctions for the alleged evil of harboring "dangerous thoughts."'
>
> "In support of its contention the Union cites among others the cases appearing in the margin.* A study of these cases discloses that in them the court was concerned with the effect of legislation, or judi-

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*These were: *Stromberg v. California*, 283 U. S. 359; *DeJonge v. Oregon*, 299 U. S. 353; *Herdon v. Lowry*, 301 U. S. 242; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Bridges v. California*, 314 U. S. 252; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624; *Murdock v. Pennsylvania*, 319 U. S. 105; *Thomas v. Collins*, 323 U. S. 516; and *Saia v. New York*, 334 U. S. 558.

cial action, which imposed a prior restraint upon speech, press or assembly, or which restricted the occasion for permissible exercise of speech, press or assembly, or which punished the individuals for having published their views.

"It is to be borne in mind that the Act was not passed because Congress disapproved of the views and beliefs of Communists, but because Congress recognized that the practices of persons who entertained the views presently to be discussed, might not use the powers and benefits conferred by the Act for the purposes intended by Congress, so, in my view, the question is whether Congress, by providing that the facilities of the Board shall not be available to a labor organization unless each of its officers shall file an affidavit with the Board that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, does not belong to, or support any organization believing in or teaching the overthrow of the United States Government by force or by any illegal or unconstitutional methods, violated the Constitution.

"It is to be remembered that neither belief, nor speech, nor association is the subject matter of the policy of §9(h) and that neither that section nor the Board's order imposes any limitation upon what any labor leader might think or say, nor does the order or §9(h) attempt to prohibit or restrain anyone from joining or supporting any organization. Neither the order nor §9(h) denies to Communists the right to speak and to publish freely their views, beliefs and opinions. They may speak as they think. There is no invasion of political rights. Communists are not denied the right to continue to remain members of the Communist Party. The section does not make

such affiliation or beliefs punishable either criminally or by the imposition of civil sanctions. In such a situation the cases cited by the Union are inapplicable and hence not controlling here, but as was said in National Maritime Union v. Herzog, 78 F. Supp. 146, 163, 'It is therefore clearly wrong to say that §9(h) impinges on a union officer's freedom of speech.'

"It is unquestioned that Congress may conclude the policies of the Act, *i. e.*, stimulation of commerce and the security interests of the nation would be deterred by an extension of the benefits of the Act to labor organizations dominated by officers who are Communists or supporters of organizations dominated by Communists, and that it may take steps to effectuate its conclusions. It fact the 'congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principal is that the power to regulate commerce is the power to enact "all appropriate legislation" * * *. That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." ' National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 36. Nevertheless, the Union contends that §9(h) contravenes the guarantees of the Ninth and Tenth Amendments. It insists that the instant case involves more than a regulatory measure, and it argues that if the statute is viewed as one 'restricting expression of advocacy,' it fails to meet the clear and present danger rule.

"While it is true that 'a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities,' cannot be supported under the Constitution, Kotch v. Board of River Port Pilot Commissioners, 330 U. S. 552, 556, yet Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for directly opposite purposes. For example, in Turner v. Williams, 194 U. S. 279, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant, and in United Public Workers v. Mitchell, 330 U. S. 75, it was held that in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity. And in Oklahoma v. Civil Service Commission, 330 U. S. 127, 143, it was held that Congress in the exercise of its powers to 'fix the terms upon which its money allotments to states shall be disbursed,' could constitutionally deny allotments to states which refuse to remove from their payrolls employees who engaged in political activity. See also *In re* Summers, 325 U. S. 561; Hamilton v. Board of Regents, 293 U. S. 245; Havker v. New York, 170 U. S. 189; Clarke v. Deckebach, 274 U. S. 392; and Kotch v. Board of River Port Pilot Commissioners, *supra*. And where factors relevant to the

attainment of legitimate legislative policies are shown, their use as a basis for distinction is not to be condemned. Hirabayashi v. United States, 320 U. S. 81, 101.* That being so, I think it well to inquire whether there are factors reasonably related to the attainment of the objectives which Congress sought to promote.

"Unquestionably, the Labor Management Relations Act, 1947, 61 Stat. 136, was designed to lessen industrial disputes. This purpose is clearly shown in the declaration of policy, §1(b) of the Act, and in the amendment to the findings and policies contained in §1 of the National Labor Relations Act.

"Prior to the passage of the National Labor Relations Act, employers were free to discharge employees for joining labor organizations, and to refuse to bargain collectively with labor organizations which represented their employees. And it is clear that when Congress enacted that Act it sought to minimize strikes in industries affecting commerce by promoting the process of collective bargaining as a practice conducive to friendly adjustments of disputes over wages, hours and working conditions between employers, and employees. In doing this, Congress im-

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*Counsel for respondents in the present cause also call attention to the following language from the *Hirabayashi* case, p. 100: "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank v. United States,* 317 U. S. 329, 337, 338, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident, or so urgent. *Kockee Consol. Coke Co. v. Taylor,* 234 U. S. 224, 227."

posed new obligations upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose those duties because it was under a constitutional obligation to employees or labor organizations to do so. On the contrary, the statute was enacted solely because Congress deemed the imposition of these duties desirable as a means of protecting the public interest in the free flow of commerce, but the benefits of the Act could not be extended to shield concerted activities which Congress had not intended to protect, National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240; Southern Steamship Co. v. National Labor Relations Board, 316 U. S. 31, and any benefit which employees or labor organizations derived from the enforcement of these public rights was entirely incidental to the public purposes which enforcement was designed to achieve. True, under the Act, the Board acts in a public capacity, but not for the adjudication of private rights; rather it exists to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining. The entire scheme of the statute emphasizes this point and the Supreme Court has so held, National Licorice Co. v. National Labor Relations Board, 309 U. S. 350; Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177; and National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U. S. 9.

"Before enactment of §9(h), hearings were conducted by Congressional committees which showed that Communists did not view labor unions primarily as instrumentalities for the attainment of legitimate economic aims; that certain practices of some labor organizations whose officers were members of or

supporters of the Communists Party tended to foment industrial unrest and strife; and that these practices were inimical to the purposes for which the protection of the Act had been granted. From the evidence thus produced and considered Congress believed that Communists and their supporters and persons who advocated the violent overthrow of the Government, when they attain positions of power and leadership in a labor organization might not practice collective bargaining as a method of friendly adjustment of employer-employee disputes, but instead might use their position as a vehicle for promoting dissension and strife between employers and employees, and that Communists and their supporters and persons who advocate violent overthrow of the Government, if in control of labor organizations, might provoke strikes disruptive of commerce, not for the purpose of improving the economic lot of union members, but to develop political power to achieve political ends, and hence, Congress, in the exercise of its discretion, concluded that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, but might endanger national interests. The reasonableness of that conclusion was for Congress to determine, North American Co. v. Securities & Exchange Commission, 327 U. S. 686, 708, and since there existed a substantial basis in fact for the conclusion reached by Congress, it seems to me that it was rational for Congress to conclude that members of the Communist Party or persons affiliated with such party who believe in and teach the overthrow of the United States Government by force or by any illegal or unconstitutional method were more likely than others to misuse the powers which inhere in union office. Hence, I conclude that Congress acted within its constitutional powers.

"The point is made that the section is invalid because the phrases 'any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods,' 'affiliated with,' and the word 'supports' are vague and indefinite and must fall before the First, Fourth and Fifth Amendments. For the reasons set forth in National Maritime Union v. Herzog, *supra,* I think the contention lacks merit. In addition, I believe that the statute is as specific as the nature of the problem permits, compare Dunne v. United States, 138 F. 2d 137, 143. Moreover, the language is not so vague that men of common intelligence would have to guess at its meaning and differ as to its application. It requires only that persons who knowingly engage in the activities set forth in §9(h), or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines shall not obtain access to the machinery set up by Congress for the purposes of advancing a specific public policy; hence if an affiant honestly believes that he is not affiliated with the Communist Party, that he does not support any organization which to his knowledge teaches the overthrow of the United States Government by means which he knows to be illegal or unconstitutional, such an affiant would be in no danger of conviction under Sec. 35 (A) of the Criminal Code, 18 U. S. C. A. §80. Compare United States v. Gilliland, 312 U. S. 86, 91; Screws v. United States, 325 U. S. 91, 101-105. See also United States v. Petrillo, 332 U. S. 1.

"The point is made that §9(h) is a bill of attainder, because, so it is said, the section proceeds not by way of defining a harmful activity and setting up sanctions against such activity, but by way of a legis-

lative declaration of the guilt of individuals and groups with respect to engaging in such activities.

"In my opinion this contention is unsound. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. Cummings v. The State of Missouri, 71 U. S. 277, 323. Section 9(h) does not rest upon any finding of guilt, but like the disqualification of convicted felons from medical practice in Hawker v. New York, *supra,* and the disqualification of aliens from operating poolrooms in Clarke v. Deckebach, *supra,* it operates not to impose punishment but to safeguard important public interests against potential evil. And as was said by Mr. Justice Murphy, 'nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality.' North American Co. v. Securities & Exchange Commission, *supra,* 711.

. . . . . .

"Minton, C. J., concurs in this opinion."

Respondents here have quoted the majority opinion in the *Inland Steel Company* case, *supra,* for the reason that it sets forth the answers to Intervenors' arguments here made through the same counsel.

The constitutionality of the section also was considered by the court and upheld in *National Maritime Union of America v. Herzog,* 78 Fed. Supp. 146, which additionally upheld §9(f) and §9(g) of the Act. On appeal, the Supreme Court affirmed the decision in upholding (f) and (g) of §9, but stated that "We do not find it necessary to reach or consider the validity of section 9(h)." (*National Maritime Union of America v. Herzog,* 68 S. Ct. 1529.) However, respondents respectfully

direct the Court's attention to the decision of the District Court (statutory three-judge court) in its full and complete consideration of the arguments advanced by Intervenors respecting §9(h).

In *Wholesale & Warehouse Workers Union, Local 65 v. Douds,* D. C., So. Dist. N. Y., being Civil numbers 46-157 and 46-405, decided June 29, 1948, by a statutory three-judge court, 15 Labor cases, CCH, 64,609, the majority of the Court held: "Finally, we sustain the constitutionality of §9(h) for the reasons set forth at length in the majority opinion in *National Maritime Union v. Herzog, supra.*" (On November 8, 1948, the Supreme Court noted jurisdiction in this cause under the name *American Communications Assn. v. Douds,* ..... U. S. .....) In *Osman v. Douds,* D. C., So. Dist. N. Y., Civil No. 46-729, the same statutory three-judge court on October 20, 1948, adhered to its decision in the *Wholesale & Warehouse Workers Union* case, *supra,* and again upheld the constitutionality of section 9(h) of the Act. (An appeal to the Supreme Court was filed in the *Osman* case on November 9, 1948.)

Thus in every case found, thus far considering the constitutionality of §9(h), the statute has been upheld. Indeed, the Congress would have been remiss in its duty to the People had it not taken some measure to protect the United States Government from the discovered potential danger. As was said in *Barsky v. United States,* 167 F. 2d 241:

> "Moreover, that the governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the federal Constitution and guaranteed by it to the States, is

explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject. In fact, the recitations in the opinion of the Supreme Court in Schneiderman v. United States, 1943, 320 U. S. 118, are sufficient to justify inquiry. To remain uninformed upon a subject thus represented would be a failure in Congressional responsibility."

The grant by Congress to a labor organization to be certified and thereafter to be the *exclusive* representative of the employees, even those not belonging to the organization, is not a fundamental or constitutional right. It is but a privilege granted by the Congress. After an intensive investigation, Congress discovered that many officers in labor organizations belonged to subversive groups which sought, not the legitimate advancement of the economic aims of the members of the labor organization, but the weakening or overthrow of the United States Government through any means including misuse of their powers as officials of the labor organization. The investigation revealed that the Communist Party was the largest and strongest of this group. For the protection of the United States Government and for preventing these union officers from misusing their powers and hence cause strife and disturbance in the field of labor relation, the Congress determined that the privilege to be certified and to act as exclusive bargaining representative—with the enforcing arm of the Government behind these privileges—should be withheld from those unions whose officers could not or would not take an oath as prescribed. Certainly, this is not only proper but Congress would have failed in its

duty had it not enacted such a statute. Similar oath has not only been required and upheld in other fields (see *Steiner v. Darby,* 88 Cal. App. 2d ....., 88 A. C. A. 487, citing, discussing and relying upon *Arver v. United States,* 245 U. S. 366; *United States v. Macintosh,* 283 U. S. 605, 624, *et seq.; Christal v. Police Commission,* 33 Cal. App. 2d 564, 567, *et seq.; Communist Party v. Peek,* 20 Cal. 2d 536; *Hayman v. City of Los Angeles,* 17 Cal. App. 2d 674; *McAuliffe v. Mayor etc. of City of New Bedford,* 155 Mass. 216*), but the requirement of taking oath as a prerequisite to securing a privilege or license, such as to practice law, even though the required oath would be contrary to the religious beliefs of the applicant for the license, has been held proper. (*In re Summers,* 325 U. S. 561.)

While *N. L. R. B. v. Edward G. Budd Mfg. Co.,* 169 F. 2d 571 (cert. applied for on November 13, 1948), did not involve the constitutionality of §9(h) of the Act, it did involve the constitutionality of portions of the Labor Management Relations Act of 1947. Many of the arguments

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*Opinion by Mr. Justice Holmes. A petition for mandamus to restore petitioner to office of policeman was before the Court. Petitioner had been removed because he violated a rule which read: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." The Court stated, "There was also evidence that he had been a member of a political committee, which likewise was prohibited." The Court held: "It is argued by the petitioner that the mayor's finding did not warrant the removal; that the part of the rule violated was invalid, as invading the petitioner's right to express his political opinions; . . . One answer to this argument . . . is that there is nothing in the constitution of the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it a part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

there made are the same as those here advanced by Intervenors. The Court held:

> "The Foreman's Association contends that §§2 (3, 11), and 14(a) of the amended Act, 29 U. S. C. A., §§152(3, 11) and 164(a), are unconstitutional as attempting to authorize employers to abridge the fundamental rights secured to supervisory employees by the First Amendment of the United States Constitution. This contention is based upon the assumption that the guarantees of freedom of speech, and of the press, and right of assembly, contained in the First Amendment include the right of employees to be affirmatively protected in their organizational activity against employer interference; that such protection afforded by the National Labor Relations Act is a constitutional right; and that Congress has no right to withdraw this protection by the provisions of the amended Act. We do not agree with this contention. The right of employees to form labor organizations and to bargain collectively through representatives of their own choosing with employers has long been recognized. N. L. R. B. v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 33, 34, . . . This right is protected by the Constitution against *governmental* infringement, as are the fundamental rights of other individuals. But prior to the National Labor Relations Act no federal law prevented *employers* from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. The National Labor Relations Act created rights *against employers* which did not exist before. N. L. R. B. v. Jones & Laughlin Steel Corp., *supra*. Such rights, however, were not private rights vested in the employees but were public rights protected by the power placed by the Act in the Na-

tional Labor Relations Board. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, . . .; National Licorice Co. v. N. L. R. B., 309 U. S. 350, 362, 363, . . .; Phelps Dodge Corporation v. N. L. R. B., 313 U. S. 177, 192, 193 . . . There is nothing in the amended Act which restricts freedom of speech on the part of supervisory employees. Section 14(a) of the amended Act specifically reserves to them the right to join a labor organization. The rights guaranteed by the First Amendment are not interfered with. The amended Act merely changes the statutory method of enforcing those rights. What Congress gave by the original Act in the way of enforcement provisions was pursuant to the policy determined by Congress at that time, which it was privileged to change by a later exercise of such power when and if it seemed advisable to it that such policy be changed. The argument to the contrary would deny to Congress the right to repeal the Act in its entirety after it was once placed in the statutes in 1935. Such legislation does not create vested rights with respect to transactions in the future.

"The Foreman's Association further contends that §§2(3, 11) and 14(a) of the amended Act are based upon arbitrary classification with resulting discrimination against supervisory employees and so violate the Fifth Amendment of the Constitution of the United States. . . . It is equally well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not

invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification if it is not patently irrational and unjustifiable. (Citing numerous cases.) There are numerous instances of valid legislation which has clasified and exempted certain types of employees from the provisions of the legislation being enacted. . . .

"We do not agree with the further contention that the supervisory employees have been deprived of a property right in violation of the Fifth Amendment or that the Amendment is akin to a bill of attainder, designed to punish, as in United States v. Lovett, 328 U. S. 303, . . . We have already pointed out that the rights created by the original act are public rights, not private rights. There is no vested right in individuals to have the rules of law remain unchanged for their benefit. (Citing cases.) A proceeding by the Board is in the public interest, and is remedial and preventative, rather than punitive in its nature. (Citing cases.) . . ."

It is respectfully submitted that the provisions of Section 9(h) of the Act, as amended (29 U. S. C. A., §159 (h)), are valid and constitutional, being within the legislative powers of the Congress.

POINT V.

If Any Portion of the Order Be Enforceable, the Board's Requested Modification Thereof Is too Limited in Scope.

In its petition for enforcement, the Board has requested that certain modifications be made and incorporated in its Order. If any portion of the Order be enforceable, it is submitted that the requested modifications, as made by the Board, are too limited in nature and scope.

1. The Requested Modification of Paragraph 1(a).

As originally made, the Order directs respondents to cease and desist from: "Urging, persuading, warning, or coercing their employees to join" certain named organizations; "encouraging membership in any of the above named organizations; and discouraging membership in United Steelworkers of America, Stove Division, Local 1981, CIO, or any other labor organization of their employees." [R. I., p. 182—par. 1(a) Order.] The Board has requested [R. I., p. 202] that this portion of the Order be modified by adding thereto only the italicized words in the following portion: "Urging, persuading *or* warning *by threat of reprisal or force or promise of benefit* or coercing their employees to join", the remaining portions to continue unchanged. This modification was requested "in order to conform with the requirements of Section 8(c) of the Act, as amended." [R. I., p. 202.]

The Board's requested modification does not cause paragraph 1(a), in the event it is to be enforced, to comply with said Section 8(c) of the Act (29 U. S. C. A., §158 (c)). This section permits the employer and also any labor organization to express and disseminate any views,

argument, or opinion, "if such expression contains no threat of reprisal or force or promise of benefit", and expressly states that such shall not constitute or be evidence of unfair labor practice. Yet, under the language of paragraph 1(a) of the Order, if modified only as requested by the Board, respondents would be directed to cease and desist from "encouraging membership" and "discouraging membership" without any qualification thereof. In order to cause paragraph 1(a) of the Order to comply with the Act, the entire paragraph, it is submitted, should be qualified by adding to the end thereof the following: "Provided that nothing in the above shall prevent the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if such expression contains no threat of reprisal or force or promise of benefit."

2. Failure to Request Modification of Paragraphs 1(b) and (c) and 2(a).

The Board has not requested any modification of paragraphs 1(b) and (c) and 2(a) of the Order. In the event these, or any of them, are to be enforced, it is submitted that certain modifications properly should be made.

So long as paragraphs 1(b) and 2(a) are definitely limited to requiring the proper respondents from recognizing or dealing with the named labor organizations "as the *exclusive* representatives" for all the employees, such would be proper, if to be enforced herein. Paragraph 1(b) seemingly recognizes this throughout. But the same may not be said for paragraph 2(a). The latter, as was done in 1(b), it is submitted, should be modified by adding the word "exclusive" before the word "representatives" in the last

phrase thus causing this phrase to read "certified by the National Labor Relations Board as the exclusive representatives of such employees."

Paragraph 1(c) of the Order, if enforceable, would without modification prevent effect being given to *any* contract between the employer and the IAM or AFL organizations even though the CIO local and parent organizations cannot be bargained with as exclusive representatives due to their failure and refusal to comply with Section 9(h) of the Act and the failure of the local to comply with Section 9(f) and (g) of the Act. It is submitted that this portion of the Order, if enforceable, should be modified to permit effective contractual relationship between the employer and the IAM and AFL organizations so long as exclusive bargaining with the CIO local and parent organizations is not required by reason of failure to comply with Section 9(f), (g) and (h) of the Act.

3. The Requested Modifications of Paragraphs 1(d) and 2(b) and 2(c).

As originally made, the Order directs respondents to cease and desist from refusing to bargain with Local 1981, CIO, as exclusive representative [R. I., p. 183—par. 1(d) Order], directs respondents upon request to bargain collectively with said Local 1981, CIO, as execlusive representative [*id.*—par. 2(b) Order], and to post a certain prescribed notice [*id.*—par. 2(c) Order]. In its petition for enforcement, the Board requests that certain modifications be made of these paragraphs of its Order. [R. I., pp. 203-204.] One modification thus requested is to condition enforcement of paragraphs 1(d) and 2(b) upon compliance by said Local 1981, CIO, within 30 days of

the Court's decree, with Sections 9(f) (g) and (h) of the Act (29 U. S. C. A. Sec. 159(f) (g) and (h)), and to condition enforcement of paragraph 2(c) upon compliance by said Local 1981, CIO, and any national and international labor organization of which it is an affiliate or constituent unit, within 30 days of the Court's decree, with Sections 9(f) (g) and (h) of the Act. (29 U. S. C. A. Sec. 159(f) (g) and (h).)

Subsequent to the filing of the Board's Petition for enforcement, said Local 1981, CIO, and the national labor organization filed their motion to intervene herein. The pleading alleges that the Local 1981, CIO, has not complied with Section 9(f) and (g) of the Act, though the reports and statements there mentioned properly are required by law. The Local 1981, CIO, states that it will comply with these requirements of the law *after* decree of this Court. This bargaining with the Court, offering to comply with statutory requirements after decree made, is submitted to be improper. Compliance with law by the Local should not be dependent upon securing a decree, favorable or otherwise, from the Court.

The ninth paragraph or allegation of the Motion to Intervene states: "Neither the officers of the United Steelworkers of America, CIO, nor the officers of Local 1981, United Steelworkers of America, CIO, have complied with Section 9(h) of the Act, as amended, nor will said officers comply." Thus, both the Local and the National organizations expressly and without equivocation state that neither will comply with Section 9(h). (29 U. S. C. A. Sec. 159(h).) In view of this positive, express and unequivocal position by the labor organizations, it is submitted that paragraphs 1(d) and 2(b) and 2(c) of the

Order should not be modified, as suggested by the Board, but that these paragraphs should be deleted entirely therefrom. Since the Local and National both avow that they will *not* comply with Section 9(h), there is no ground or reason for conditioning enforcement of these paragraphs upon the doing of that which each positively states will not be done. It therefore is submitted that these paragraphs, i. e., 1(d), 2(b) and 2(c), of the Order should be deleted therefrom and enforcement of these paragraphs denied under the circumstances.

If, despite the foregoing conditions, the Court be of the opinion that these three paragraphs are to be enforced with such a time condition attached, it should be noted that the modifications, as requested by the Board, are too limited in scope and nature.

As originally made, the Order directs respondents to cease and desist from "Refusing to bargain collectively with United Steelworkers of America, Stove Division, Local 1981, CIO, as the exclusive representative of all production and maintenance employees" etc. [R. I., p. 183—par. 1(d) Order.] It thus is seen that the paragraph refers only to the local union organization and does not refer to nor include reference to any national or international labor organization of which it is an affiliate or constituent unit. The Board has requested [R. I., p. 203] that this portion of its Order be modified by adding after the words "CIO" the phrase: "If any (and?) when said labor organization shall have complied within thirty (30) days from the date of the decree enforcing this order, with Sections 9(f), (g) and (h) of the Act, as amended." However, Sections 9(f), (g) and (h) require compliance therewith not only by the local union organization but also

by any national or international labor organization of which it is an affiliate or constituent unit. (29 U. S. C. A. Sec. 159(f), (g) and (h).) Hence, the requested modification made by the Board is too limited in nature and scope and the paragraph, if to be enforced, it is submitted, should be modified not only to refer to compliance by the local CIO organization but also to compliance by "any national and international labor organization of which it is an affiliate or constituent unit."

As originally made, the Order directs respondents to: "Upon request, bargain collectively with United Steelworkers of America, Stove Division, Local 1981, CIO, as the exclusive representative of all production and maintenance employees' etc. [R. I., p. 186—par. 2(b) Order.] The Board has requested [R. I., p. 203] that this portion of its Order be modified by inserting after the words "Upon request" the following phrase: "And upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above." Here again, the modification would refer expressly only to the "Union"—local in nature—and would not include any national or international labor organization of which it is an affiliate or constituent unit. As in the case of paragraph 1(d), the requested modification made by the Board is too limited in nature and scope and paragraph 2(b), if to be enforced, it is submitted, should be modified not only to refer to the local Union but also to "any national and international labor organization of which it is an affiliate or constituent unit."

As originally made, the Order directs respondents to: "Post at their plant at Los Angeles, California, copies of the notice attached hereto, marked 'Appendix A'" at cer-

tain places and for a prescribed period of time. [R. I., p. 184—par. 2(c) Order.] The Board has requested that this portion of its Order be modified in two respects: (1) that the prescribed notice, "Appendix A", be modified [R. I., p. 202] by inserting therein the words "by threat of reprisal or force or promise of benefit"* and (2) by inserting in paragraph 2(c) after the words "notice attached hereto" the following phrase: "provided that said labor organization, and any national or international labor organization of which it is an affiliate or constituent unit, shall have complied, within thirty (30) days from the date of the decree enforcing the Board's order, with Section 9(f) (g) and (h) of the National Labor Relations Act, as amended." [R. I., pp. 203-204.] The request by the Board for modification in this latter respect apparently also asks for modification of the prescribed Notice (by insertion of the same phrase), although no posting whatever would be required until compliance by said organizations. It is submitted that the Notice, if one be required to be posted after compliance with the Act, as amended, by the Local and National CIO organizations, should not be so modified.

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*The Board states that its request in this regard is made "in order to conform with the requirements of Section 8(c) of the Act, as amended." However, as in the case of the request for modification of paragraph 1(a) of the Order, discussed *supra* subdivision "1" of this Point, the requested modification fails to cause a conformance with said Section 8(c) of the Act. In order to cause conformance with the statute, if this portion of the Order is to be enforced, it is submitted that the prescribed notice should be modified by adding to the end of the third subparagraph of said Notice the following phrase: "but, as provided by law, we have and retain the right to the expressing of any views, argument, or opinion, and of the dissemination thereof, whether in written, printed, graphic, or visual form, if such expression contains no threat of reprisal or force or promise of benefit."

Under the modifications suggested by the Board, there is no means provided whereunder respondents or any of them would know whether either Local 1981, CIO, or the National or both have complied with the Board's requested conditions. It is submitted that, if a decree of enforcement is made conditional upon compliance within 30 days by said labor organizations with the law, the condition also properly should be inserted therein requiring said labor organizations to give respondents notice of the time of such compliance.

For the reasons first above stated, however, it is submitted that paragraphs 1(d) and 2(b) and 2(c) should be refused enforcement by reason of the CIO, local and national, organizations' refusal to comply and positive assertion that neither will comply with the Act as amended.

Conclusion.

For the foregoing reasons and each of them it is respectfully submitted that the Petition for Enforcement should be denied in its entirety; that if any portion or part of the Board's Order be deemed enforceable such may and should not be enforced against any individual respondent who was not properly before the Board nor against the separate partnership entity; and that if any portion or part of the Board's Order be deemed enforceable such portion or part should be modified in accordance with the suggestions therefor made in this Brief.

Respectfully submitted,

CECIL W. COLLINS,

Attorney for Respondents.

No. 11919

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFE AND MERRITT MANUFACTURING COMPANY AND L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., AND WILBUR G. DURANT, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS PIONEER ELECTRIC COMPANY, RESPONDENTS

AND

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C. I. O., and PHILIP MURRAY, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STEELWORKERS OF AMERICA, C. I. O., INTERVENORS

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board

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ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is submitted in support of the constitutionality of Section 9 (h) of the National Labor Relations Act, as amended, which is challenged by the intervenors, United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, individually and as president of the United Steelworkers of America, herein called the Union. The procedural posture in which the question arises is set forth in our main brief at pages 3 and 33–34. The interpretation of Section 9 (h), as distinguished from its constitutionality, is set forth

in our main brief at pages 92–106, and is presently undisputed by either the Union or the employer.

Section 9 (h) of the Act, as amended provides as follows:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (c) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

STATUS OF COURT DECISIONS INVOLVING CONSTITUTIONALITY OF SECTION 9 (H)

The Court would probably wish to be advised of the present status of Court decisions on the issue of the constitutionality of Section 9 (h). To date there has been a total of five Court rulings on the issue, four by statutory three-judge courts pursuant to 28 U. S. C. A. 380 (a) (Judicial Code) [1] and one by a United States Court of Appeals in a proceeding under Sec-

[1] *National Maritime Union* v. *Herzog*, 78 F. Supp., 146 (D. D. C.), affirmed as to 9 (f) and (g) thereby, according to the Supreme Court, making it unnecessary for it to rule on the constitutionality of 9 (h), 334 U. S. 854; *Wholesale Workers Union* v. *Douds*, and *American Communications Ass'n* v. *Douds*, 79 F. Supp. both decided by S. D. N. Y. June 28, 1948, probable jurisdiction noted by Supreme Court in *American Communications Ass'n* v. *Douds* November 8, 1948; *Osman* v. *Douds*, S. D. N. Y., decided September 20, 1948; appeal filed in Supreme Court.

tion 10 (f) of the Act to review a Board order.[2] All of the three-judge court cases cited in footnote 1 above, were rendered in actions brought by unions which had not complied with Section 9 (h) to enjoin the holding of a Board election to determine the employees' choice of a bargaining agent without the noncomplying plaintiff union on the ballot. The Court of Appeals case, *supra,* involved a proceeding such as here, in which the charging union (the same union, in fact as the intervenor in the instant proceeding before this Court) contested a provision in which the Board imposed as a condition to an order directing an employer to bargain collectively with the charging union the requirement that the union, within 30 days, comply with the filing provisions of Section 9 (h).

In all of these cases, the attack upon the constitutionality of Section 9 (h) was unsuccessful. In *National Maritime Union* v. *Herzog, supra,* the first of the three-judge court cases, the plaintiff attacked the constitutionality of Section 9 (h) and also of Sections 9 (f) and (g). Sections 9 (f) and (g), like Section 9 (h), prescribe upon unions certain filing requirements as a condition to access to Board facilities. The data required to be filed by Sections 9 (f) and (g) consist of information relating to the union's finances and organizational structure. In a decision rendered April 13, 1948, the three-judge statutory Court of the District of Columbia unanimously upheld the constitutionality of Sections 9 (f) and (g) and, with Judge Prettyman dissenting, also upheld the constitutionality of Section 9 (h). 78 F. Supp. 146. On appeal, the Supreme Court affirmed the lower court's ruling as to the constitutionality of Sections 9 (f) and (g), thereby making it unnecessary, in its opinion, to pass on the constitutionality of Section 9 (h). 334 U. S. 854.

All of the other three-judge court cases cited in footnote 1, *supra,* were decided by the same three-judge court in the Southern District in New York. In each instance, the Court, with District Judge Rifkind dissenting, upheld the constitutionality of Section 9 (h) on the identical ground as the majority of the court in the *National Maritime Union* case. 79 F. Supp. 563.

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[2] *Inland Steel Co.* v. *N. L. R. B.* and *United Steel Workers of America* v. *N. L. R. B.*, 170 F. 2d 258 (C. A. 7), decided September 23, 1948.

In the *Inland Steel* case, *supra,* the Seventh Circuit, with Judge Major dissenting, upheld the constitutionality of Section 9 (h) as imposing a valid condition to receipt by the union of the benefits of the Act.

Two of the three-judge court cases above cited, *American Communications Association* v. *Douds* and *Osman* v. *Douds,* are pending on direct appeals to the Supreme Court under Section 380 (a) of 28 U. S. C. A. (Judicial Code). The United Steelworkers of America, the Union involved in the *Inland Steel* case,[3] filed a petition for certiorari with the Supreme Court to review the ruling of the Seventh Circuit on Section 9 (h).

The Supreme Court, on November 8, 1948, noted probable jurisdiction in the *American Communications Association* v. *Douds.* The briefs of the parties have been filed in that case, and the case is due to be argued on or about February 28, 1949. The Supreme Court, on January 17, 1949, granted the petition for certiorari filed by the United Steelworkers of America (C. I. O.) to review the decision of the Seventh Circuit in the *Inland Steel* case.[4]

SUMMARY OF ARGUMENT

Congress acted within its constitutional powers in adopting and authorizing the Board to apply the policy of refusing to order employers to bargain with labor organizations whose officers do not file the affidavits contemplated by Section 9 (h) of the Act, as amended.

A. The withholding from a labor organization of the benefits of an order requiring an employer to bargain collectively with the organization does not impinge upon the constitutional right to self-organization.

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[3] Actually, the *Inland Steel* case was a consolidation of two proceedings, one brought by the company to review a Board order directing it to bargain with United Steelworkers in regard to pension plans and the other brought United Steelworkers to set aside the condition of the order requiring the union to comply with Section 9 (h). We refer to the case hereinafter as the *Inland Steel* case, since thereby it is distinguished from other proceedings, still pending, in which the United Steelworkers is seeking the same relief as it did in the *Inland* case (e. g., this case, also *W. W. Cross, Inc.* v. *N. L. R. B.* (C. A. 1), argued December 7, 1948, and awaiting decision.

[4] The *Inland Steel Company* has itself filed a petition for certiorari to review the merits of the Board's bargaining order in that case. The petition is still pending.

B. The condition imposed upon the Board's order, and the congressional policy embodied in Section 9 (h) which it effectuates, do not invade rights to freedom of speech or freedom of the press, or deny freedom of political belief, activity, or affiliation.

C. Congress could reasonably believe that the policies of the Act, and the security interests of the Nation, would not be fostered by extension of the benefits of the Act to labor organizations whose officers are Communists or supporters of organizations dominated by Communists.

D. The means adopted by Congress to assure that the benefits and facilities of the Act shall not be extended to labor organizations whose officers are Communists or supporters of organizations dominated by Communists or to persons who believe in or support organizations which advocate violent overthrow of the government are appropriate.

E. The condition contained in the Board's order is not unconstitutional because the facts required to be stated in the affidavit are allegedly "vague" and "indefinite."

F. Section 9 (h) of the Act is not a bill of attainder.

G. The condition contained in the Board's order does not encroach upon freedom of thought or freedom of political affiliation.

H. The wisdom of the legislation is not a matter for judicial review.

ARGUMENT

Congress acted within its constitutional powers in adopting and authorizing the Board to apply the policy of refusing to order employers to bargain with labor organizations whose officers do not file the affidavits contemplated by Section 9 (h) of the Act, as amended

A. The withholding from a labor organization of the benefits of an order requiring an employer to bargain collectively with the organization does not impinge upon the constitutional right to self-organization

The Union in its brief (pp. 50–68) contends that the withholding of the benefits which would accrue to it from enforcement of the Board's order, in and of itself, apart from the reasons for such withholding, denies to the Union its "funda-

mental rights to engage in organizing since the purpose of organizing is collective bargaining" (Br., p. 53). The Union further asserts that the refusal of government to require the Company to bargain collectively with the Union is unconstitutional because such refusal "would confine petitioning labor organization to the exercise of its economic strength in protection against employer attempts to destroy it" (Br., p. 54). This contention amounts to saying that the undisputed constitutional right of employees to associate in labor organizations comprehends a right to compel Congress to require employers to recognize and bargain collectively with labor organizations. The effect of this theory is to equate the protections of the National Labor Relations Act, which is the creature of Congress, with rights existing under the Constitution. The theory is patently unsound.

The Constitution protects the right of employees to form labor organizations and to bargain collectively, as it protects other civil rights,[5] only against infringement by government. Prior to 1935 employers were free to discharge employees as reprisal for joining labor organizations and to refuse to bargain collectively with labor organizations which represented their employees, as well as to create and to dominate labor organizations composed of employees for the purpose of frustrating the organization of truly independent unions among them. It can hardly be claimed that by failing to restrain employers from engaging in such practices Congress was evading any obligation under the Constitution.

As the Seventh Circuit stated in upholding the validity of Section 9 (h) in the *Inland Steel* case,[6] Congress, in enacting the National Labor Relations Act, "imposed new obligations

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[5] Compare *Shelley* v. *Kraemer*, 334 U. S. 1, holding that judicial enforcement of racial restrictive covenants violates the Fourteenth Amendment although the making and voluntary performance of such covenants does not. The Court pointed out, 334 U. S. at 13, that the Fourteenth Amendment, like other provisions of the Constitution, "erects no shield against merely private conduct, however discriminatory or wrongful." Compare, *Hurd* v. *Hodge*, 334 U. S. 24, 28–29, dealing with analogous obligations of the Federal government under the Fifth Amendment, in which the Court again reiterated the absence of obligation upon governments under the Constitution to illegalize or restrain private invasions of civil rights.

[6] See *supra*, p. 3.

upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose these duties because it was under constitutional obligation to employees or labor organizations to do so. On the contrary the statute was enacted solely because Congress deemed the imposition of these duties desirable as a means of protecting the public interest in the free flow of commerce" (170 F. 2d at 265). The entire scheme of the statute emphasizes the point. In the Act Congress created rights correlative to the obligations which it imposed upon employers. It did not however vest these rights in employees or in labor organizations, the rights accrued to society itself, for they were not private but "public rights"; power to enforce them was vested exclusively in the National Labor Relations Board; enforcement was to be solely in the public interest, and was to serve to effectuate only the public policy which, by enacting the statute, Congress sought to promote. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265; *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362–363; *Phelps-Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 192–193, 194, 200; *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 47; *Jacobson* v. *N. L. R. B.*, 120 F. 2d 96, 99–100 (C. C. A. 3); cf. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25. "Any benefit which employees or labor organizations might derive from enforcement of these public rights was entirely incidental to public purposes which enforcement was designed to achieve." *Inland Steel* case, *supra*, 170 F. 2d at p. 266. Indeed, the benefit which accrued to a labor organization from enforcement of a Board order against an employer who had violated the Act, was held by the Supreme Court in *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18–19, to be a factor which might properly militate against the issuance of a complaint by the Board, or enforcement of a Board order. In that case, the Court made it plain that if the issuance of a Board complaint or order would redound to the benefit of a labor organization which engaged in conduct deemed detrimental to public policy, or which might utilize that benefit for purposes alien to the objectives of the Act, the Board could properly refuse to proceed.

We submit that the fact that the National Labor Relations

Act has been in effect for more than 12 years and that its protections have proved of great value to employees and labor organizations has not given them a constitutional right to its perpetuation.

In support of this position, however, the Union in its brief (pp. 58, 61, 64–65), cites the dissenting opinion of Judge Prettyman in *N. M. U.* v. *Herzog*, 78 F. Supp. 146, 179, affirmed, 334 U. S. 854.[7] Judge Prettyman as the Union claims, did predicate his opinion that Section 9 (h) is unconstitutional upon the view that the withdrawal from labor organizations of the benefits which accrue to them as a consequence of Board orders and of utilizing Board facilities is, in and of itself, an invasion of the constitutional right of employees and labor organizations to self-organization. In answer to the Board's contention in that case, that Congress could properly withhold the benefits of the Act from labor organizations whose officers failed to file the affidavits contemplated by Section 9 (h), Judge Prettyman stated: "If the effect of the denial of the benefit were not an infringement of a constitutional right, I might agree with the government's view" (p. 182). But, as we demonstrate more fully below (pp. 9–10, *infra*), the affirmation by the Supreme Court of the unanimous holding of the court in the *N. M. U.* case, *supra,* sustaining the constitutionality of Section 9 (f) and (g) of the Act establishes conclusively that the denial of the benefits of the Act does not infringe any constitutional rights. This is so because the consequences which flow from failure to comply with Section 9 (f) and (g) are the same as those which flow from failure to comply with Section 9 (h), and if such consequences were an invasion of a constitutional right, then more would have been required to sustain the validity of Section 9 (f) and (g) than that these requirements have a reasonable relation to the purposes of the statute, yet the existence of such reasonable relation is all that the Board relied on in urging and the court relied on in upholding the validity of 9 (f) and (g), *N. M. U.* case, *supra,* pp. 160–161.

In the *N. M. U.* case the union contended that denial to it of a place on the ballot in a Board conducted election, because it had not complied with Section 9 (f) and (g), constituted an

[7] See *supra*, p. 3.

invasion of its constitutional right to self-organization. In that case the union claimed, as the petitioning Union claims here (pp. 50–68), that access to the administrative machinery and benefits of the Act is so essential to the effective functioning of labor unions that to deny such access to some unions while permitting access to others results inevitably in destruction of the excluded organizations and thereby denies their right to organize for purposes of collective bargaining. It was argued there (p. 158), as here (Br. pp. 68–70), that because of the "results that flow" access could be denied to certain labor organizations only if some "clear and present danger" required this, and that access could not be made conditional upon filing and reporting requirements which were supported merely as reasonable requirements, incidental to valid legislation under the Commerce Clause.[8] The statutory three-judge court composed of Circuit Judges Miller and Prettyman and Chief Justice Laws of the United States District Court for the District of Columbia rejected this contention (p. 146). The court held (pp. 146, 159) that since the requirements of Section 9 (f) and (g) with respect to filing and reporting are "incidental to the power, which Congress was exercising, of granting an extraordinary privilege" (the privilege of acting as exclusive

[8] The Union in that case, as the Union does here (pp. 51–55), asserted that the provisions of Section 8 (b) (4) (B), 8 (b) (4) (C), and 303 (b) of the Act, as amended, insofar as they illegalize certain strikes and secondary boycotts and subject labor organizations which engage in such conduct to suits for damages and injunctions, operate as sanctions to insure compliance with the requirements of Sections 9 (f), (g), and (h). The Board pointed out, however, in its brief, that these sections cannot possibly be said to operate as sanctions against non-compliance with the requirements of Sections 9 (f), (g), and (h), since Section 8 (b) (4) (C) affects alike complying and non-complying labor organizations when they seek to represent employees who have selected another bargaining agent which the Board has certified, and Section 8 (b) (4) (B) affects non-complying unions no differently from complying unions which fail to obtain a certification. Clearly, any challenge to these provisions, in any event, can be made at the earliest when attempt is made to apply them to the activities of a particular labor organization. *Watson* v. *Buck*, 313 U. S. 387; *Alabama State Federation of Labor* v. *McAdory*, *supra*. Presumably for these reasons, which are equally applicable in this case, the statutory court in the *N. M. U.* case did not even mention this contention of the union in its opinion. The union pressed the point in its appeal to the Supreme Court, however, and the Supreme Court's *per curiam* affirmance of the judgment below must be taken therefore as a holding that the contention is without merit.

bargaining representative under the statute), Congress could lawfully demand that unions which desired to avail themselves of the privilege first comply with the filing and reporting requirements. The Court concluded that the consequences upon self-organizational activity of wilful non-compliance by a union with conditions which Congress was entitled to impose could not be attributed to Congress or to the Board, but solely to the union itself, and that denial of the benefits of the Act to labor organizations which refused to comply could therefore not be said to deprive those labor organizations of their constitutional right to freedom of association (pp. 160–161).

In affirming the judgment of the statutory court and rejecting the position taken by the union on appeal, the Supreme Court necessarily held (334 U. S. 854–855), that denial of access to the machinery and benefits of the Act to labor organizations which do not comply with conditions precedent erected by Congress does not invade the constitutional right of those labor organizations or of their members to freedom of self-organization. In addition, the Supreme Court necessarily held, as did the court below, that since no civil right was denied by the withholding of the benefits of the Act, the validity of conditions imposed by Congress upon receipt of those benefits is to be tested not by the standard of the "clear and present danger" rule, but by whether the condition is incidental and reasonably related to the objectives for which the facilities of the Act were designated.[9] We discuss this point *infra*, pp. 13–16.

Finally, insofar as the Union's claim that the right of union members to select their own officers is invaded (Br., pp. 62–64) rests upon the contention that their freedom is destroyed by the withholding of the benefit of the Board's order, the claim is likewise devoid of substance in the light of the Supreme Court's decision in the *N. M. U.* case, *supra*. Thus, if Section 9 (f) had imposed the obligation to file financial reports on

[9] Since the Supreme Court's decision in the *N. M. U.* case, a three-judge court in *American Communications Association* v. *Schauffler*, 22 L. R. R. M. 2261 (D. C., E. D. Pa.), decided June 21, 1948, upheld the validity of Section 9 (f) and ((g) on the authority of the Supreme Court's decision in the *N. M. U.* case. The status of the cases dealing with the constitutionality of Section 9 (h) is set forth at pp. 2–4, *supra*.

one or more officers of the union, rather than upon the union as such, it could hardly have been contended that the Section was an unconstitutional interference with the right of unions to select their own officers merely because to secure the benefits of the statute union members might require their officers to file such returns or oust those officers who refused to do so. The Union, in its brief, apparently recognizes this, for it asserts, in connection with this argument (p. 63), that "Congress is forbidden by our Constitution to intrude into the area of political belief and opinion either for the purpose of barring individuals from holding office or coercing others to bar them." But if the substantive requirements of Section 9 (h) may be said to be invalid, as the Union claims, because they unconstitutionally "intrude into the area of political belief and opinion," they would be invalid regardless of their effect upon the voluntary action of union members in selecting officers. If, on the other hand, Congress is entitled to demand compliance with those requirements as a condition to the receipt by a union of the benefits of a Board order, the legislation is not rendered invalid because the importance of those benefits may induce union members to elect officers who choose to comply with the requirements of the law rather than those who do not.[10] See pp. 21–24 *infra*.

[10] In his dissenting opinion in the *Inland Steel* case, *supra*, Judge Major took the position (p. 255) that because the affidavits contemplated by the Section are to be made by union officers, whereas the denial of benefits affects the union as such, the statute is arbitrary and unreasonable. But this argument overlooks the fact that a union can act only through its officers, and that Section 9 (f), while it speaks in terms of filing by the union, contemplates that such filing will be done by the responsible officers of unions, precisely as does 9 (h). If the responsible officer or officers failed or refused to comply with the filing requirements of Section 9 (f) for whatever reason, the union's membership would be placed in precisely the same position as they would if the union's officers failed to file the 9 (h) affidavits. The suggestion that the union members desiring to obtain the benefits of the Act would be unable to do so because they could neither compel their officers to file the documents nor oust those who refused to do so is one which even the petitioner does not make, presumably because, among other things, recent history demonstrates that such a contention would be wholly without substance. The argument that Congress is wholly without power to distinguish between bargaining representatives or types of union leadership with respect to bestowing the benefits of the Act, because such distinction tends to influence employees to choose eligible rather than

sion for permissible exercise of these rights, or which granted facilities for the dissemination of certain views, or for the gathering of certain associations, which were denied to others, or which punished individuals for having published their views or having joined an association.

In *Thomas* v. *Collins, supra,* for example, the Supreme Court held unconstitutional a state statute which imposed a prior restraint (requirement of registration) upon the right to solicit membership in a labor organization.[11]

There speech itself was restrained by the statute; criminal punishment was imposed on the act of speaking if the speaker had not previously registered. In the *Abrams, Herndon, Stromberg, Winters,* and *Thornhill* cases, *supra,* the statutes involved made the acts of speaking or of distributing literature, or of displaying symbols a crime. In the *Lovell, Cantwell,* and *Hague* cases, *supra,* the statutes involved imposed licensing requirements as conditions upon speech or assembly, and made speech or assembly without prior license a crime. In the *DeJonge* and *Whitney* cases, *supra,* the statutes involved made the act of joining a lawful organization, or attending a lawful public meeting a crime. In *Saia* v. *New York,* 68 S. Ct. 1148, the statute imposed restraints upon the use of loud speakers, which the Court regarded as a protected instrumentality of speech, and made speech through loud speakers a crime. In the *Schneider* case, *supra,* the state restricted opportunity for distributing literature by prohibiting distribution on the streets.

It is to statutes such as these, which impose prior restraints upon speech, press or assembly, or which make speech, or the

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[11] It may be noted, in passing, that that case did not hold that the states were without power to impose even registration or licensing requirements upon the occupation of labor union officer, which carries with it the power to call or instigate political, as well as economic strikes. That occupation, like the practice of medicine and dentistry, and other fiduciary occupations, affects the interests of union members, and of the public, and is therefore subject to regulation to the extent necessary to protect legitimate public interests. "That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas Court said, hardly to be doubted." *Thomas* v. *Collins,* 323 U. S., at 432. And the Supreme Court pointed out in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S., 450, 469, "labor organizations are subject to regulation." Accord: *N. M. U.* v. *Herzog, supra.*

distribution of literature, or attendance at a meeting, or membership in an association an offense, that the "clear and present" danger rule to which the Union refers (pp. 70–76), applies. Only statutes which restrict opportunities for the expression or dissemination of views and information, or prohibit the expression of particular views in order to protect some competing public interest (compare the statutes involved in the *Schneider, Winters,* and *Cantwell* cases, *supra*), "must be narrowly drawn to deal with the precise evil which the legislation seeks to curb;" only such statutes must define specifically the conduct which is prohibited so that individuals may be entirely free to engage in conduct which the Government may not properly forbid.

As the Seventh Circuit stressed in the *Inland Steel* case, 170 F. 2d at p. 264, the Board's order, however, like Section 9 (h) itself, does none of these things. It does not deny to Communists, or to supporters of "Communist Front" organizations, the right to speak and to publish freely their views and opinions. It does not deny to them the right to continue to remain members of the Communist Party, or to continue to support "Communist Front" organizations. It does not deny to any person the right to believe in violent overthrow of the Government or to support organizations which advocate such a program. None of these activities or beliefs is made subject to prior restraint by Section 9 (h) or by the Board's order; neither that Section, nor the Board's order, makes these activities or beliefs punishable either criminally or by the imposition of civil sanctions. "In such a situation," observed the Seventh Circuit, in the *Inland Steel* case, "the cases cited by the union are inapplicable and hence not controlling here" (p. 264). Only if Section 9 (h) had undertaken so to restrict the exercise of freedom of speech or of the press, or of the freedom to join political parties would the question have been presented whether such activities could properly be deemed by Congress to give rise to so grave and imminent a danger to government that their curtailment was necessary to self-preservation. Compare *Schenck* v. *United States,* 249 U. S. 47; *Frohwerk* v. *United States,* 249 U. S. 204; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 414; *Lewis Publishing Co.* v. *Morgan,*

299 U. S. 288, 313; *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790.

Since neither congressional policy nor the Board's order imposes any prior restraint upon belief or association the only question, as the majority noted in the *Inland Steel* case, is whether Congress may validly distinguish between labor organizations which may receive the benefits of Board orders and those which may not, on the basis of whether their officers are members of, or affiliated with the Communist Party, or believe in, or support organizations which believe in or teach, violent overthrow of the United States Government. This question is to be answered, as the authorities discussed below demonstrate, not by reference to the "clear and present danger rule," but rather by inquiry whether these factors are reasonably related to the attainment of the objectives which Congress properly sought to promote.

It has long been recognized that the Fifth Amendment, though lacking an equal protection clause, guards against legislation by the Federal Government which either imposes regulations upon, or grants benefits to certain groups and not others, where the basis for distinguishing between those subjected to the regulation, or entitled to receive the benefits, and those not regulated or benefited, is irrelevant to the legitimate purposes for which the regulation is imposed or the benefit granted. See *Hirabayashi* v. *United States,* 320 U. S. 81, 100. Because differences of "color, race, nativity, religious opinions, political affiliations" (*American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92), "are in most circumstances irrelevant" to the legitimate purposes for which benefits may be granted or regulation imposed, distinctions based upon such factors are, in most circumstances, "therefore prohibited" by the Fifth Amendment. *Hirabayashi* v. *United States,* 320 U. S. at p. 100; *Hurd* v *Hodge,* 68 S. Ct. 847. As Mr. Justice Black pointed out, speaking for the Court in *Kotch* v. *Pilot Commr's,* 330 U. S. 552, 556, "a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reasons having *no rational relation* to the regulated activities," could not be supported under the Constitution. [Italics added.]

However, as the Supreme Court has said "it by no means follows" that because the fact of race, like political belief or affiliation is "in most circumstances irrelevant" to legitimate legislative purposes, it is always irrelevant (*Hirabayashi* v. *United States, supra*). Alienage, too, is often irrelevant to the objects of specific legislation (*Takahashi* v. *Fish and Game Commission,* 68 S. Ct. 1138) but "it does not follow that alien race and allegiance may not have in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification." *Clark* v. *Deckebach,* 274 U. S. 392, 396. Where factors such as these are shown to be relevant to the attainment of legitimate legislative policies, their use as a basis for distinction "is not to be condemned merely because in other and in most circumstances [such] distinctions are irrelevant." *Hirabayashi* case, *supra,* 320 U. S. at p. 101.[12]

[12] Even where legislative or administrative distinctions based on race or similar factors result in denying to a single group, not merely benefits which government is under no obligation to grant, but fundamental civil rights, such distinctions are not always unconstitutional. "Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never can." *Korematsu* v. *United States,* 323 U. S. 214, 216. The *Korematsu* and *Hirabayashi* cases, *supra,* afford a striking illustration of the distinction between the types of governmental action to which the clear and present danger rule applies and those to which the "rational basis" test applies. In those cases curfew and exclusion restrictions were imposed upon persons of Japanese ancestry who lived on the West Coast. The Court considered two questions: (1) whether the possibility of sabotage was so grave and imminent a danger to national security as to justify denial to individuals generally, of their fundamental civil liberties to freedom of movement and freedom to choose their own place of residence, (2) whether Congress and the military authorities could reasonably believe that the evil to be feared was more likely to stem from citizens of Japanese ancestry, than from other classes of citizens. As to the first question, the Court applied the "clear and present danger rule." See, 320 U. S. at p. 99, and 323 U. S. at pp. 217–218. The second question was decided pursuant to the "reasonable relations" rule. On this point, in the *Hirabayashi* case, the Court noted that it could not say that with respect to the specific issue involved there was "no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U. S. at p. 101.

Applying the approach of these cases to the instant case it becomes apparent that only if Congress had prohibited Communists and believers in violent overthrow of government from holding office in labor unions, as it has not, and only if the Union further established that the right to hold office in labor unions, like the right to leave one's house after 8 p. m., is a fundamental civil right, and that government therefore could not impose reason-

Thus, where distinctions based on political activity, belief, or affiliation or upon race, religion, or alienage, are made in regulatory legislation the question presented is whether these factors are relevant to the particular valid objects of the regulation. Where such distinctions are made, as in the instant case, in connection with the grant of benefits the sole question presented is whether the factors used are incidental and reasonably related to the particular purposes for which the benefits are properly granted.

Examples of its application best illustrate the operation of the rule. In *United Public Workers* v. *Mitchell,* 330 U. S. 75, it was held that, in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity.[13] In that case, the Court disposed of the contention that Congress could not condition the privilege of government employment upon surrender of constitutional rights, particularly where it could not be proved that the exercise of such rights had any bearing whatever upon the efficiency with which the employees involved performed their duties.[14] The Court pointed out that it was sufficient to sustain the legislation that Congress *"reasonably deemed"* political activity by government employees as interference "with the efficiency of the public service." 330 U. S., at 101. (Italics supplied.) In *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, 142–143, it was held that, in the exercise of its power to "fix the terms upon which its money allotments to states shall be disbursed," Congress could constitutionally deny allotments to states which refused to remove

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able limitations upon the classes of persons who may hold such office (but see note 11, *supra*, and pp. 23–24, *infra*) would the question be presented whether the presence of Communists and believers in violent overthrow of government in such positions give rise to a clear and imminent danger of political strikes? The answer to that question, of course, is in the affirmative. (Ibid.)

[13] The Court, in passing, quoted Mr. Justice Holmes' classic epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *New Bedford,* 155 Mass. 216, 220, 29 N. E. 517. (330 U. S., at 99, note 34.)

[14] Compare *Crane* v. *New York,* 239 U. S. 195, 198, and *Clarke* v. *Deckebach,* 274 U. S. 392, upholding the power of a state to bar aliens from public employment.

from their pay rolls employees who engaged in political activity. In that case the Court overruled objections based not only on the fact that exercise of constitutional rights was made the basis for denial of benefits but also on the fact that Congress thereby regulated local political activities of state officials, a field reserved exclusively to state control.

In *Friedman* v. *Schwellenbach*, 159 F. 2d 22, certiorari denied, 330 U. S. 838, the United States Court of Appeals for the District of Columbia upheld the use of the factors of adherence to the Communist Party line and active participation in organizations dominated by the Communist Party as the basis for denying to individuals the privilege of retaining governmental employment. Such activities and affiliations were deemed relevant to the loyalty with which individuals might perform their governmental duties.

In re Summers, 325 U. S. 561, held that a State may constitutionally deny membership in its bar to persons who, because of religious convictions, refused to take an oath to bear arms in time of war. *Hamilton* v. *Board of Regents,* 293 U. S. 245, held that a State may bar from its colleges persons who, for religious reasons, refused to attend classes in military training.

In *Turner* v. *Williams,* 194 U. S. 279, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant. Although, as the Union points out in its brief (p. 66), the power of Congress over immigration may not be exercised in violation of the Bill of Rights, it was determined in that case that the action of Congress in excluding an immigrant purely because of his passive attachment to the principles of anarchy violated no constitutional inhibition. Belief in anarchy, the Court held, was not unrelated to the question which was within the power of Congress to determine, i. e., whether the immigrant would tend to be a desirable resident.[15]

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[15] Accord: *Lopez* v. *Howe*, 259 Fed. 401 (C. C. A. 2) certiorari denied, 254 U. S. 613; *United States ex rel. Georgion* v. *Uhl*, 271 Fed. 67 (C. C. A. 2), certiorari denied, 256 U. S. 701; *Ex Parte Carminita*, 291 Fed. 913 (D. C. N. Y.); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. C. A. 2), certiorari denied, 287 U. S. 607; *Abern* v. *Wallis*, 268 Fed. 413 (D. C. N. Y.).

While a state may not, under the Constitution, arbitrarily ban aliens from lawful occupations (*Truax* v. *Raich,* 239 U. S. 33; *Takahashi* case, *supra*), a state may guard against presumed evil propensities of certain aliens by prohibiting all aliens from operating pool halls (*Clarke* v. *Deckeback,* 274 U. S. 392, 396–397); engaging in the insurance business (*Pearl Assurance Co.* v. *Harrington,* 38 F. Supp. 411, affirmed, 313 U. S. 549); shooting wild game or carrying arms used for sporting purposes (*Patsone* v. *Pennsylvania,* 232 U. S. 138), and even from owning land (*Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313.

Again, although race is seldom a valid basis for distinguishing as between groups to be subjected to certain regulations (*Takahashi* case, *supra*), we have seen in the Japanese exclusion cases, *supra,* pp. 17–18 n. 12 that where the race factor is relevant to the valid purpose of the legislation involved, the legislature or the government may validly utilize that factor in classifying the groups to be regulated.

Finally, even blood relationship and friendship have been held to be a valid basis for classification in those cases where their relevancy appears. Thus, in *Kotch* v. *Pilot Commissioners,* 330 U. S. 552, it was held that a state could constitutionally deny the right to practice the occupation of river pilot to all except friends and relatives of licensed pilots. Although such a basis for classification would, in most cases, be prohibited by the Constitution, the Supreme Court held that because it was not shown that this method of classification was totally unrelated to the legitimate governmental objective of securing a safe and efficient pilotage system, the legislation as administered was immune from attack.

In *Hawker* v. *New York,* 170 U. S. 189, one of the pioneer cases in establishing the "reasonable relation" test it was held that a state could constitutionally prevent persons who had previously been convicted of a felony from practicing medicine. Cf. *Dent* v. *West Virginia,* 129 U. S. 114.

One reading the brief of the Union would hardly be aware that these controlling decisions of the Supreme Court existed. Most of them are ignored altogether; and some are brushed

aside on a basis entirely unsupported by a reading of the cases. Instead, the Union, to establish its claim that Section 9 (h) invades civil liberties, relies exclusively upon the allegation that, because the benefits of the Act are available only to union officers who are not members or supporters of the Communist Party and who do not believe in violent overthrow of government, a consequence of Section 9 (h) will be to induce labor union officers to withdraw from or refrain from becoming affiliated with the Communist Party, and to renounce belief in violent overthrow of government (Br., pp. 21–25, 27–28, 30–32, 50, 63, 69, 70, 73–75). A further consequence, it asserts, will be to induce union members to oust from union office those who refuse to file the affidavits (Br., pp. 50, 60). The Union argues (Br., p. 50) that because Congress could not, absent "clear and present danger", constitutionally directly compel union officers to refrain from joining or to withdraw from the Communist Party, or to renounce belief in violent overthrow of the government, any legislation which may induce union officers to take such action is *ipso facto* unconstitutional.

But the validity of legislation enacted pursuant to powers conferred upon Congress by the Constitution is not to be tested by the possible consequences of such legislation upon the voluntary action of individuals. If the contrary were true, Congress would have been without power to enact the Social Security Act, in which Congress offered a rebate of ninety per cent of the unemployment compensation taxes collected within the state to those states which enacted particular types of unemployment compensation legislation. For clearly Congress was without power under the Constitution directly to compel the states to enact such legislation. Yet in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 585–598, it was held that since the imposition of taxes and the granting of rebates was an appropriate exercise of the power of Congress over taxation and expenditures, the legislation could not be condemned because it tended to accomplish results which Congress was without power under the Constitution to accomplish directly. Similarly in *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, it was held that the exercise of Congressional power to erect and oper-

ate electric power plants and to sell power so produced at rates fixed by Congress, was not to be condemned because the effect of such sales at rates which private power companies could not profitably meet was to drive such companies out of business. Clearly, however, Congress had no power under the Constitution directly to prohibit private companies from engaging in the electric power business. So too, in *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, it was held that Congress could constitutionally condition grants-in-aid to the states upon removal by the states from their pay rolls of persons who exercised their constitutional right to engage in political activity. Clearly, however, Congress had no power under the Constitution directly to prohibit persons employed by state governments from engaging in political activity. Moreover, Congress had no power under the Constitution to compel state governments so to restrict political activity of their employees.

In each of these cases the effect of the legislation or administrative action was to induce voluntary action which constitutional limitations precluded Congress from compelling directly. Yet in none of these cases was this fact held to detract from Congress' "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Oklahoma* v. *Civil Service Commission, supra,* at p. 143. That the adoption of particular means may have an effect upon activities which Congress may not constitutionally control, does not, as the Court specifically held in the *Oklahoma* case, make the use of such means invalid.

To the extent that the Union's argument on this phase of the case rests upon the allegation that the hypothetical action of union leaders in restricting their political activities and beliefs, and the hypothetical action of union leaders in ousting union officers who do not do so would not in fact be voluntary but would rather result from coercion flowing from the alleged need to secure the benefits offered by the statute, the argument is likewise answered by the cases cited above. In *Steward Machine Co.* v. *Davis, supra,* 301 U. S., at pp. 585–591, for example, the Supreme Court held that the ninety percent rebate offered to the states, though it constituted a powerful "inducement" and "temptation" to enact the desired

legislation, did not amount to "coercion" of the states in violation of the Tenth Amendment. To fail to draw the line between "temptation" and "coercion," said Mr. Justice Cardozo, speaking for the Court, "is to plunge the law into endless difficulties." 301 U. S., at pp. 590–591.[16]

Again, the Union argues in its brief (pp. 13, 17, 40–41, 57, 66–67, 68) that Section 9 (h) is unconstitutional because the motive for its adoption was to drive from office, in those labor organizations subject to the Act, union leaders who are members or supporters of the Communist Party, or who believe in violent overthrow of the government. But this argument, like the argument made in the *Steward* case which sought to condemn the Social Security Act because the motive for its adoption was to induce the states to enact unemployment compensation laws, "confuses motive with coercion." 301 U. S., at p. 591. When Congress, as in the Social Security Act, and in Section 9 (h), grants benefits upon condition the condition is not to be invalidated unless the conduct required for its fulfillment is unrelated to the legitimate purposes for which the benefit is granted, or to any other legitimate end. Where reasonable relation exists between the condition and the legitimate legislative end to be attained "inducement or persuasion does not go beyond the bounds of power." *Steward* case, *supra,* at p. 591. Of course, just as a tax imposed by Congress is not valid "if it is laid upon condition that a state may escape its operation through adoption of a statute *unrelated* in subject matter to activities fairly within the scope of national policy

[16] To the extent that *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Linder* v. *United States*, 268 U. S. 5, upon which the Union relies (p. 63), may be taken as suggesting a contrary rule these cases must be regarded as having been overruled by the Steward case, and the other cases discussed, *supra*, pp. 21–22. The Union also relies, as did Judge Major dissenting in the *Inland Steel* case, upon *Frost* v. *Railroad Commission*, 271 U. S. 583. In *Stephenson* v. *Binford*, 287 U. S. 251, 272, 275, the Supreme Court explained that the rule of the *Frost* case applied only where there was "no relation" between the condition and the privilege accorded, i. e., where the condition was an end in itself and not a "means to a legitimate end." Where, as here and in the *Stephenson* case, there is a reasonable relationship between the condition and the legitimate objects for which the benefits are given, the legislation is not to be invalidated even where compliance with the condition may involve voluntary surrender of a constitutional right. See Hale, *Unconstitutional Conditions*, 35 Col. L. Rev. 321, 357.

and power" (*Steward* case, *supra,* at p. 590, italics added), so the denial of benefits under the Act would not be valid if the conditions which labor organizations are required to meet to obtain those benefits were unrelated in subject matter to the activities which Congress legitimately sought to promote and encourage by enactment of the National Labor Relations Act.

The "clear and present" danger rule would be inapplicable even if Congress had, as it has not, prohibited all Communists and the like from holding office in labor unions. Because the occupation of labor union officer, like other fiduciary occupations, affects the public interest, Congress is clearly empowered to require that persons desiring to engage in the occupation meet qualifications reasonably deemed appropriate to safeguard the public interest. And the validity of the qualifications required is, of course, not to be determined under the "clear and present danger" rule, but rather by the presence or absence of a rational connection between the qualifications and the legitimate end in view. See cases cited, *supra,* pp. 18–20.

Moreover, even if the right to hold office in a labor union were, unlike the right to practice other occupations, deemed beyond the reach of legislative power save to avoid a "clear and present danger" of substantative evils, a regulation which prohibited Communists from holding office in labor unions would be adequately supported. For the evidence recited, *infra,* pp. 25–39, shows, as the Court held in the *N. M. U.* case, that Communist officers of unions do misuse their powers to call strikes in the interests of the Party. Such conduct is clearly within the power of Congress to proscribe. To avoid the clear danger that Communist officers will engage in such conduct, Congress could, under the classic statement of the clear and present danger test (*Schenck* v. *United States,* 249 U. S. 47, 52), exclude Communists from union office. The Court in the *N. M. U.* case held, after extended analysis, that Section 9 (h) does meet the "clear and present danger" test, if that test is applicable (79 F. Supp. 165–169) and the Court in the *American Communications* case (*supra,* pp. 2, n. 1, 3) adopted that opinion as its own.

The Board in the cases thus far decided believed that since the clear and present danger test is manifestly inapplicable, it

was unnecessary to argue that that test had been satisfied. However, it does not concede and never intended to concede that the test, properly understood (see text, *supra*, p. 24) could not be met, even though there seems to have been some misunderstanding of its position by the dissenting judge in the *American Communications* case (79 F. Supp. p. 563), and in the *Inland Steel* case (170 F. 2d 247).

The instant statute does not, however, prohibit Communists and the like from holding office in labor unions. We turn then to the precise questions which may here properly be presented. These are: (1) whether denial of the benefits of the Act to labor organizations whose officers are Communists or members of Communist-dominated organizations, or who believe in, or support organizations which advocate violent overthrow of the government, is reasonably related to the objectives which Congress legitimately sought to promote by enactment of the statute, and (2) whether the methods utilized to promote these objectives are appropriate means for their effectuation.

C. Congress could reasonably believe that the policies of the Act, and the security interests of the Nation would not be fostered by extension of the benefits of the Act to labor organizations whose officers are Communists or supporters of organizations dominated by Communists

In enacting the National Labor Relations Act, Congress sought to minimize strikes in industries affecting commerce by promoting the process of collective bargaining as a practice conducive to "friendly adjustment" of disputes over wages, hours and working conditions between employers and employees. In addition, Congress sought to promote self-organization among employees for the purpose of equalizing bargaining power between employees and employers, to the end that wage earners would receive a larger share of the products of industry and thereby enable the nation to avoid calamitous depressions. In that Act, Congress itself excluded one class of labor organizations, those supported or dominated by employers, from its benefits (Section 8 (2)), because Congress believed that the objectives which it sought to attain through the Act would not be fostered if employees were represented for

purposes of collective bargaining by such organizations. It also excluded certain groups of employees such as agricultural laborers and domestic servants (Section 2 (3)). As we have indicated above, moreover (pp. 6–7 *supra*), the Supreme Court in the *Indiana & Michigan* case, 318 U. S. 9, 18–19, held it to be incumbent upon the Board to withhold its processes, and hence the benefits of the Act, where those processes were invoked by labor organizations which sought to use those benefits for purposes alien to the policies of the Act. And, as the Seventh Circuit noted in the *Inland Steel* case, *supra* (pp. 265–266), "the benefits of the Act could not be extended to shield concerted activities which Congress had not intended to protect," citing *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; and *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31. See also *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332.

In amending the Act, Congress determined that the extension of the benefits of the Act to certain other types of employees or labor organizations likewise would not tend to effectuate the statutory policies or might endanger other important national interests. Thus, to guard against the dangers of divided allegiance, Congress denied the benefits of the statute to labor organizations composed of supervisors (Sections 2 (3), 2 (11), 14 (a), and to labor organizations composed of rank and file workers when they seek to represent plant guards (Section 9 (b) 3). To "protect the rights of individual employees in their relations with labor organizations whose activities affect commerce" (Section 1 (b)), Congress in Sections 9 (f) and (g) provided for denial of the benefits of the Act to labor organizations which failed to file and disclose to union members specified financial and structural reports and information. This requirement, that labor organizations which desire to use the benefits of the Act file and make available to union members information relevant to the functioning of such organizations and to the obligations and privileges of membership, being intimately related to the intelligent exercise by union members of the right to select bargaining representatives, the protection of which was an object of the legislation, is of established validity. *N. M. U.* v. *Herzog, supra.* The provisions of Section 9 (h) are part of this pattern of restrictions imposed by

Congress upon the benefits of the Act for the purpose of guarding against misuse of those benefits and frustration of the legitimate objectives of the statute.

In Section 1 of the National Labor Relations Act, as amended, Congress incorporated the following finding:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

As we shall demonstrate below, Section 9 (h) was the product of the determination by Congress that certain practices of some labor organizations whose officers were members of or supporters of the Communist party, or who believed in or supported organizations which advocated violent overthrow of the Government were inimical to the purposes for which the protection of the statute was granted. Congress determined that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, and might endanger national security interests. As we shall further demonstrate below, Congress believed that Communists and their supporters do not view labor unions primarily as instrumentalities for the improvement of the economic position of employees vis-a-vis their employers, but rather as weapons in a struggle to achieve political ends. Congress further believed that Communists and their supporters, and persons who advocate violent overthrow of the government, when they attain positions of power and leadership in a labor union, would be likely not to practice collective bargaining as a method of "friendly adjustment" of employer-employee disputes, but, instead as a vehicle for promoting strife between employers and employees. Congress also believed that Communists and their supporters, and persons who advocate violent overthrow of the government, if in control of labor organizations, would be prone

to provoke strikes disruptive of interstate commerce, not for the purpose of improving the economic lot of union members, but for political purposes. And finally, Congress believed that officers of labor organizations who are Communists, or supporters of communism, would be likely, in periods of national emergency, to utilize their power within such organizations to call and promote strikes contrary to the interests of our government, if those interests happened to be opposed to the interests of a foreign power, Soviet Russia.

In its report recommending enactment of a predecessor provision to Section 9 (h) the House Committee on Education and Labor stated (H. Rep. No. 245, 80th Cong., 1st Sess., p. 39): "Communists use their influence in unions not to benefit workers but to promote dissension and turmoil." Congressman Hartley, manager of the bill in the House, urged that the benefits of the Act should be limited to labor organizations whose leaders were "devoted to honest trade unionism and not class warfare and turmoil" (93 Cong. Rec. 3535).[17] Numerous Congressmen, during the course of debate, indicated their belief that in periods of national emergency Communist leaders of trade unions might promote strikes for the purpose of undermining the ability of the government to effectuate its policies (93 Cong. Rec. 3704–3712). Representative Kersten pointed out (93 Cong. Rec. 3577–3578): "We know that it is the purpose of the Communist Party to use the labor union as a tool to bring about the spread of their anti-human doctrine."

In the Senate, Senator McClellan, sponsor of Section 9 (h), stated (93 Cong. Rec. 5095):

> * * * a small minority of Communists are able to infiltrate into these organizations, and by the processes under which they operate they are able to rise, and they have risen, in some unions to official positions. * * * If they rise to positions of power as officers in labor organizations, then, with the law that we enact, investing certain powers in labor organiza-

[17] References to the Congressional Record throughout are to the unbound daily edition.

> tions, such as the power of collective bargaining, and other powers and rights that we have legislated and invested in them, we are simply placing the power and authority and the sanction of law behind men who are in those positions, giving them authority to bargain collectively to deal with management of industry and thus wield a greater influence in the economic and political life of the Nation. We are simply giving authority to people who are not loyal to our Government, who will use that power as Communists have demonstrated in the past they will use it, for the purpose of subversive work and for undermining the very fundamentals upon which this Government rests.

The opponents of the measure attacked it not because its objective was improper, but because they did not believe that the means selected for coping with the danger were wise. For example, Senator Morse stated (93 Cong. Rec. 5290): "I need not reiterate my opposition to Communists and their beliefs. I shall fight Communism with all my energy because it destroys the liberties of freemen. I want to say that Communism must be stamped out of the free labor movement of this country, if we are to preserve the rights of free workers and protect the dignity of the individual." President Truman, in his veto message, stated (93 Cong. Rec. 7503): "Congress intended to assist labor organizations to rid themselves of Communist officers. With this objective I am in full accord."

The conclusions of Congress, that Communist leaders of labor organizations might utilize the powers derived from protection accorded by the Act to foster policies other than the collective bargaining favored by Congress derived from the personal experience and observation of the legislators and from testimony before the House and Senate Committees which considered the bill, and they comported with the conclusions reached by other Committees of Congress, and with the judgment of many trade-union leaders and numerous experts in the field of industrial relations. Much of that supporting evidence which, we here set forth, is spelled out in the majority opinion in the *N. M. U.* case, *supra,* at pp. 168–171; 175–176.

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In 1941, the House Committee on Un-American Activities stated in its report (H. Rep. No. 1, 77th Cong., 1st Sess., pp. 9–10): [18]

> The evidence which the committee has gathered bears abundant testimony to the fact that throughout the years there has been a major purpose of the Communist Party to attempt to bore from within the ranks of American labor in an effort either to turn labor organizations into its political tools or to disrupt and destroy them. * * *
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> It is of basic importance to understand the exactly opposite purposes of the American labor movement on the one hand and the Communist Party on the other. The aims of the American labor movement are to improve the conditions of the American workers and over a period of time to secure for them a better and fuller life and a place of partnership in the industrial life of the United States. The purposes of the Communists on the other hand are in the words of Stalin to make the unions a school of communism, to increase in every possible way the antagonism between wage earners and other sections of the population and to prostitute the labor movement for the use of the party in carrying out various of its international plans even if in so doing the welfare of the particular group of workers in question may suffer as a consequence. Hence, wherever Communists have gained a foothold in the labor movement they have sought by every means at their command to remove from office any labor leader however devoted to the welfare of the rank and file workers he might be who has refused to cooperate with the party line.
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> We find that the program of the Communist Party calls for determined opposition to the national-defense program and for a concentration of efforts in basic and war industries. The committee's records show that

[18] See, also, H. Rep. No. 2, 76th Cong., 1st Sess., pp., 46–64 (1939), describing Communist penetration of labor unions.

> from the Communist standpoint the main purpose of a strike is political and in order to further in some way or another the program of Moscow. Clearly, this could be served by the bringing about and prolonging of strikes in defense industries. Thus we see again how diametrically opposite are the aims and purposes of the American labor movement on the one hand and the Communist Party on the other.

The House Committee which considered Section 9 (h) heard Mr. Louis Budenz, onetime managing editor of the official Communist newspaper, The Daily Worker, and former member of the National Committee of the Communist Party, testify that, to his knowledge, a strike which occurred in 1941 at the Milwaukee plant of the Allis-Chalmers Company, had been deliberately precipitated and provoked by the Communist officers of the local union at that plant as a result of instructions delivered to those officers by the Political Committee of the Communist Party; and that the purpose of the strike was not to improve the economic position of the union but to impede the American program of giving aid to Britain, and thereby to assist the effectuation of the foreign policy of the Soviet Union.[19] Mr. Budenz further testified that Communist leadership during this period, had, for the same reason, precipitated a strike at the North American Aviation Company.[20] The effect of the strike at the Allis-Chalmers plant on the defense program was related to the House Committee by Mr. Storey, Vice President of the Company. He testified that the strike, lasting 76 days, held up for that period delivery of power units (turbo-generators) "to a plant that the Government wanted to build to make powder during wartime."

On the floor of the House, Congressman Kersten summarized Mr. Budenz' testimony concerning the Allis-Chalmers strike, as an example of the dangers of vesting additional power in the hands of labor leaders who are Communists or supporters of the party. He said (93 Cong. Rec. 3577–3578):

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[19] Hearings before the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 3603–3623. See also, pp. 1380–1487, 1973–2142. Compare Hearings before the Senate Committee on Labor and Public Warfare, 80th Cong., 1st Sess., pp. 819–873.

[20] House Hearings, op. cit. note, pp. 1384–1385.

> One example of Comunist tactics that came to the attention of our Committee * * * is the example testified to by Mr. Lous Budenz, former editor of the Communist Daily Worker. Budenz testified that the Communist Party Political Committee in New York decided in the year 1940 that a strike should be called in the Allis-Chalmers Co., of Milwaukee, because they were one of the few firms making steel turbines for United States destroyers and that by pulling the strike in that plant they could bring about a following of the party line at that time of opposing aid to Britain. That was before Hitler attacked Russia. Budenz testified as to traveling to Milwaukee and meeting in secret with Mr. Eugene Dennis, present secretary of the Communist Party, and with Mr. Harold Christoffel, the Communist Party member and president of the Allis-Chalmers local, at which secret meeting it was decided to strike the plant pursuant to the decision in New York of the Communist Party. * * * It was later determined by the Milwaukee courts that over 2,000 of the strike ballots were fraudently stuffed into the boxes. That the Communist Party, as agents of a foreign government, should be able to cause a strike in an American plant is horrifying. * * *

Congressman Hartley stated to the House (93 Cong. Rec. 3533), that "If anyone doubts the need of [Section 9 (h)] all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order."

Congress was not unaware that Communist officers of labor organizations sometimes effectively represent the economic interests of members in collective bargaining, and in grievance adjustment, especially during fortuitous periods of nonconflict between the party line and American policy and that to this extent their activities during these happy intervals do tend to effectuate the policies of the Act. But Congress believed that whatever public value Communist leadership of labor unions might have in this respect was clearly outweighed by the danger

that they might, on other occasions, utilize their power and influence for purposes inimical to the policies of the Act and to national security. Mr. Story testified that (House Hearings, *supra,* pp. 1392–1393):

> The Communists cleverly intertwine grievances, we will say real grievances, imagined grievances, and then they make up grievances to cause unrest, so that they appear to be carrying on good trade-union practice at times. They delude the workers and * * * that is one of the reasons that our workers do not appreciate the menace of communism, because they seem to be working for the benefit of the workers in a trade-union area.

Congressman Kersten stated to the House (93 Cong. Rec. 3577):

> * * * in times past, Communists and their fellow travelers made a specialty of studying trade-unionism and the technique of the union hall. They became experts in the knowledge of trade-union matters so much so that many good American workers have been willing to place their fate in the hands of party-line officers only to find that they became the dupes of Communists tactics. * * *

The experiences of prominent leaders of national labor organizations confirm the opinion of Congress that diversity exists between the economic goals of trade-union activity which Congress seeks to foster and protect in the Act, and the political objectives toward which Communist leaders of trade-unions seek to orient their organizations.

In 1934, the Fifty-Fourth Annual Convention of the American Federation of Labor adopted a resolution relating to Communist infiltration into labor unions which read, in part, as follows:

> Members of the Communist Party have endeavored to bore within the trade-union movement and establish so-called cells within local unions for the purpose of destroying the trade-union movement by making it a part of the Communist political party so that the pur-

> poses and the method of applying the objectives of the Communist party could be put into operation in the industrial field.[21]

In its Fifty-Fifth Convention, the Executive Council of the Federation adopted a report declaring that Communists "are not acting in the unions as trade-unionists, but rather as Communists. Instead of being loyal to their unions, they are loyal to their party." [22]

In its Fifty-Ninth Convention, in 1939, the Federation adopted a resolution recommending that Communists be excluded from membership in unions affiliated with the American Federation of Labor. The resolution declared in part: [23]

> It is the openly avowed and clearly stated purpose of the Communist Party to obtain control of labor unions in order, first to use them as recruiting grounds for more members and followers; secondly, to use them in order to spread inflammatory propaganda and so influence the great mass of workers; and thirdly, to use them to create strikes and make impractical demands in order to disrupt industry and then seize it for the social revolution;
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> * * * * *
>
> Communist agitators, working under definite instructions from the organized Communist Party, are constantly endeavoring to "bore from within" in every union, to the end that they may obtain positions of influence and control and so lead the workers along the road to Communism; and
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> In every instance where Communist-led groups have obtained any measure of such control in labor unions

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[21] Committee Report, Resolution No. 201—by Delegate Paul Porter, Radio Factory Workers' Union, Federal Labor Union No. 18609, in Report of the Proceedings of the Fifty-fourth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1934, p. 557.

[22] Report of the Proceedings of the Fifty-fifth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1935, p. 832.

[23] Resolution No. 83 in Report of the Proceedings of the Fifty-ninth Annual Convention of the American Federation of Labor, Judd & Detweiler, Washington, D. C., 1939, pp. 492, 505.

> they have led the workers into strikes and industrial conflict, not for the legitimate purpose of bettering conditions, improving wages or hours, or defending the workers from attack, but for the radical purpose of developing class conflict, and for the purpose of creating situations which they could use for the spread of Communist propaganda;
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> * * * * *
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> These Communist leaders in their efforts to promote class warfare, and ignoring the legitimate purpose of labor unions and the legitimate interests of the workers, have disrupted unions, divided the workers into warring camps, crippled industrial production, and caused loss of jobs and wages to the mass of the workers * * *.

Impressive in this regard also, is the experience of Joseph Curran, president of the National Maritime Union (C. I. O.). Writing in the "Pilot," official newspaper of the N. M. U., President Curran recounted the efforts of Communists within the union during the period of hostilities between Germany and Russia, to force upon the union a policy of collaboration with employers and total abandonment of strikes, whatever the cost of such a policy to the economic interests of the union members. He pointed out, however, that since the end of the war, shortly after relations between the United States and Russia began to deteriorate, the Communists did their utmost to preclude the establishment of amicable relations and to provoke hostility between employers in the industry and the union. On both occasions, Curran pointed out, the policy advocated by the Communists in the union was "the policy of the Communist Party."[24] In the columns of the "Pilot" for October 10, 1947, Curran exposed the efforts of the Communists in the N. M. U. to gain control of the union convention. He said in part: "Any rank and filers who thought that this was a simple fight between officials for power can now see by the action of the Communists at this convention that it is not. It is a fight by the Communists to either control our

[24] N. M. U. "Pilot," September 12, 1947, page 2, cols. 3–4.

Union or destroy it. Nothing less." [25] President Curran repeated this observation on October 24, 1947, in a column in which he also said: "They [Communist delegates] came to the convention fully instructed and with a program directed by the highest chiefs in the Communist Party * * *. These party delegates [who voted contrary to the instructions of their union constituencies] proved beyond a shadow of a doubt that they represented NOT the membership of the N. M. U., but belonged body and soul to the Communist Party." [26] In a column appearing on November 7, 1947, Curran pointed out that by virtue of Communist control, "Instead of laying stress on the needs for jobs for our members and internal problems of our Union, the greatest space in the "Pilot" is devoted to the material that the Communist Party is pushing." [27] On November 21, 1947, Curran disclosed in his column that Communist leaders within the union, after their defeat in the convention, had undertaken to destroy the union, by promoting unnecessary strikes and by refusing to settle grievances amicably with employers.[28]

In an article appearing in the New York Times on May 11, 1947, David Dubinsky, President of the International Ladies Garment Workers Union (A. F. of L.), recounted the experience of that union in 1926, when, for a short period, the New York locals of that organization were subject to Communist leadership. These leaders, he stated,[29] "succeeded in plunging the coat and suit industry into a general strike. After a futile eight-week struggle the local Communist leaders had had enough. They were ready to come to a settlement, but the Communist Party, feeling that the Moscow line was about to change, ordered their agents inside the union to continue the strike—against their better judgment and against the interest of the workers. * * * It took ten years for us to recover from the criminal and stupid Communist-led strike of 1926 which cost $3,500,000 and left in its wake a chaotic industry and a crippled union." In the same article he explained.[30]

[25] "Pilot," page 2, cols. 2–3.
[26] "Pilot," October 24, 1947, p. 2, col. 2.
[27] "Pilot," p. 2, col. 2.
[28] "Pilot," p. 2, cols. 2–3; p. 9, col. 4.
[29] Part VI, p. 11.
[30] *Ibid.*, p. 7.

> The workers organizations are the largest and most vital nongovernmental body in the community. They are primarily dedicated to improving working conditions, to raising living standards. They are part of a delicate mechanism of modern life, the core of "human engineering." The influence of organized labor reaches far beyond its 13,000,000 members or their families.
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> For this reason the significance of Communist operations in trade unions can scarcely be exaggerated. Like termites, they bore into the "house of labor," but are not an integral part of the structure because the spirit and aims of totalitarian communism are totally distinct from and hostile to the ideals and policies of trade-unionism.

In February 1945, while the Retail, Wholesale and Warehouse Employees Union (C. I. O.), was engaged in a strike provoked by the recalcitrant refusal of Montgomery Ward & Co. to bargain collectively with that Union, or to accede to directives of the National War Labor Board, locals of that Union, which were under Communist leadership, castigated the leadership of the national union severely for having undertaken the strike. The official union publication that month carried an article demonstrating that these attacks upon the national leadership of the union were a betrayal of the Union's interests, and were dictated only by adherence to the Communist Party "line" which, during that period, denounced all strikes, and completely subordinated all legitimate trade-union interests to the need for continued production while the United States and Russia were allies in the war.[31]

Spokesmen for the Communist Party, former Communist party officials, and students in the field of labor relations agree that Communist leaders of labor organizations utilize trade-unions not primarily as instruments for advancing the economic welfare of workers through the process of collective bargaining, but rather as weapons of class warfare for the

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[31] The Retail, Wholesale, and Department Store Employee, February 1945, pp. 5, 14.

advancement of political objectives.[32] In his book, *I Confess,* Benjamin Gitlow, formerly a prominent Communist, stated as follows:

> In the Communist movement, *control* is a factor of the greatest importance. Every Communist, no matter in what organization he belongs, has it continually hammered into his head that the objective of a Communist must be to gain control. As soon as Communists gain control of a union, a strike, or any kind of activity, the Party steps in and runs the union, leads the strike, and directs the activity.

In the face of this evidence Congress could and did reasonably conclude, as the Seventh Circuit held in the *United Steelworkers* case and the District Courts held in the *N. M. U. Warehouse Workers cases,* that extension of the benefits and protection accorded in the Act to labor organizations led by Communists and their supporters would not tend to effectuate the policies of the Act; that such organizations might utilize the powers accorded exclusive bargaining representatives by the Act to foment strikes and discord rather than to promote the economic welfare of union members, and amicably to settle disputes; and that to vest additional power in the hands of such organizations might constitute a danger to national security. "The reasonableness of that conclusion," as emphasized by the Seventh Circuit in the *Inland Steel* case, "was for Congress to determine" (170 F. 2d at 266), citing *North American Co.* v. *S. E. C.,* 327 U. S. 686, 700.

It cannot, we believe, be denied that Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for dif-

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[32] See, *e. g.,* Foster, *From Bryan to Stalin* (International Publishers Co., 1937); particularly pp. 153, 154, 162–163, 213–215, 272–273, 275, 276, 277, 298–299; Saposs, *Left Wing Unionism* (International Publishers Co., 1926), p. 64: "In the relations of the unions with employees and the government 'class struggle' tactics are counselled as against 'class collaboration' tactics"; Foster, *Toward Soviet America* (Coward-McCann, Inc., 1932), pp. 232–233, 258–259, 266; Gitlow, *I Confess* (E. P. Dutton & Co., Inc., 1940), p. 334–395; O'Neal & Werner, *American Communism* (E. P. Dutton & Co., Inc., 1947), pp. 231–236, 245–246, 312–313.

ferent and antithetical purposes. The privileges and benefits of the Act are conferred upon labor organizations by Congress for the accomplishment of specific public purposes; Congress is under no obligation to extend those privileges and benefits to all organizations blindly, without regard to whether such extension will effectuate the policies which Congress seeks to promote.[33] It is no less a legitimate objective of Congressional power to guard against the danger of misuse of facilities created by Congress for specified purposes than to create such facilities in the first place. The objective of Section 9 (h) being clearly within the power of Congress, we now examine the appropriateness of the means adopted by Congress for its attainment.

D. The means adopted by Congress to assure that the benefits and facilities of the Act shall not be extended to labor organizations whose officers are Communists or supporters of organizations dominated by Communists or to persons who believe in, or support organizations which advocate violent overthrow of the government are appropriate

In selecting means appropriate to effectuate its objective of insuring that the benefits and facilities of the Act not be extended to Communists and their followers who might utilize those benefits and facilities for the accomplishment of objectives which Congress did not desire to promote, Congress took cognizance of the fact that many Communists do not openly acknowledge their affiliation; and that many persons who follow and support the policies and objectives of the Communist

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[33] Because, as Judge Prettyman agreed in his dissenting opinion in the N. M. U. case, *supra*, pp. 182–183, and as the Union apparently concedes in its brief (pp., 42, 73), Congress is clearly empowered to deny the benefits of the Act to labor organizations which it has reason to believe may use those benefits for purposes other than those which Congress specifically desired to protect, and because Congress is not bound by the Constitution to protect all union activities alike, or protect none, the decision of the Supreme Court in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156; the dissenting opinion in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 417, 436, and the decision of the Supreme Court of California in *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 855, upon which the Union relies (Brief, p. 67), are inapposite here. For these cases follow the principle that when governments, under the Constitution, undertake to facilitate the dissemination of information, or to facilitate freedom of assembly, they are empowered only to facilitate the dissemination of views, as such, or assemblies, as such; governments have no power under the Constitution to facilitate only the expression of favored views, or meetings of approved groups. An

Party are not themselves Party members.[34] It was for this reason that Congress in Section 9 (h) provided that each officer of a labor organization seeking to invoke the facilities of the Board must file an affidavit under oath, that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or any illegal or unconstitutional methods.

Absent the requirement that union leaders themselves declare whether they are Communists or affiliated with the Communist Party, and whether they believe in, or support organizations which believe in, the overthrow of the government by violence or illegal means, the objective of Congress to withhold the facilities of the Act from organizations led by Communists or supporters of Communism could not practicably be achieved. An oath, such as that suggested by Judge Prettyman in his dissenting opinion in the *National Maritime Union* case, *supra,* at pp. 180–181, that the "officer of the Union did not advocate the use of the strike for political purposes or merely to prevent strife, and would not, under penalty, so advocate or act," would not serve adequately to guard against such conduct. For such an oath could be taken with complete immunity to prosecution for perjury until after the event; union leaders could become

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attempt to restrict to favored groups or views media which government may constitutionally make available only for the purpose of facilitating the spread of information, must of course, therefore, fall. The constitutional objection present in the cases cited by the Union, but absent here, is best epitomized in the following quotation from James Mill ("Liberty of the Press," Encyclopedia Brittanica, Supp. 6th Ed. 1921—Reference Shelf IV #9, p. 83):

"Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion and of recommending them by any medium of persuasion which the author may think proper to employ. If any obstruction is given to the delivering of one sort of opinions, not given to the delivering of another; if any advantage is attached to the delivery of one sort of opinions, not attached to the delivery of another, so far equality of treatment is destroyed; and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing."

[34] Compare testimony of Louis Budenz before the House Committee, Hearings, 80th Cong., 1st sess., pp. 3604–3605; 3616, 3622–3625; see also, pp. 1425–1426; O'Neal & Werner, *op. cit. supra,* note 41, pp. 331–333, 223–225, 206–207.

entrenched in positions of power from which they could engineer political strikes without risk of penalty until after the evil was perpetrated. The evils which the statutory scheme is designed to prevent could be perpetrated with no recourse open to the government save to punish for the commission of acts which it is the objective of the statute not to punish but to avoid. Section 9 (h), like Section 11 (b) (1) of the Public Utility Holding Company Act, "is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to national economy from becoming a reality." *North American Company* v. *Securities & Exchange Commission,* 327 U. S. 686, 710–711. In any event, this method selected by Congress, is clearly appropriate for the purpose of insuring that the facilities of the Act not be extended to the groups which Congress reasonably desired to exclude. And when a choice of appropriate methods is available the choice is for Congress to make.

The scope of the declaration required by Section 9 (h) is likewise appropriate to the objective of identifying the groups from which the evils to be avoided were most to be feared. Congress could properly consider that not only those union leaders who were themselves Communists or affiliated with the Party, but also those leaders who believed in, or supported organizations which believed in, overthrow of the government by violence or illegal means, might tend to utilize their powers as exclusive bargaining representatives for objectives alien to collective bargaining concerning "wages hours or other working conditions." Certainly, as stated by Seventh Circuit in the *Inland Steel* case, *supra* (170 F. 2d at 266), "it was rational for Congress to conclude that [such persons] were more likely than others so to utilize the powers which inhere in union office." Cf. *Bryant* v. *Zimmerman,* 278 U. S. 63, 73, 76–77, discussed at length in the opinion of the District Court in *National Maritime Union* v. *Herzog, supra,* at pp. 146, 169–170; *Clarke* v. *Deckebach,* 274 U. S. 392, 396–397; *Hirabayashi* v. *United States, supra.* Nor was it incumbent upon Congress to find that all persons in the excluded categories would necessarily

misuse the powers of union office. Provided the classification adopted is "not shown to be irrational," and no such showing is even attempted in this case, Congress may exclude "an entire class rather than its objectionable members selected by more empirical methods." *Clarke* v. *Deckebach, supra,* at p. 397.

As the National Labor Relations Board pointed out in its decision in *Matter of Northern Virginia Broadcasters, Inc.,* 75 N. L. R. B. 11, 20 L. R. R. M. 1319, October 7, 1947, the affidavit provisions of Section 9 (h) were intended, in part, to accomplish identification of union leaders to union members as Communists or supporters of Communism on the theory that if the union members were aware of such affiliation by their officers they would oust them from office. It can hardly be doubted that in protecting employee freedom of choice in the self-organizational sphere, Congress would be empowered, even directly, to require those who compete for employee support to disclose matters such as this which employees may consider directly relevant to their choice. By providing employees with an incentive to replace Communist with non-Communist leaders, Congress likewise acted to accomplish an objective well within its powers to avoid interruptions to interstate commerce. For Congress could reasonably conclude, as it did, that political strikes would be less likely to occur and true collective bargaining would best be fostered if labor organizations were headed by non-Communists. Since Congress utilized only means within its power thus to safeguard interstate commerce, the section is immune to attack.

The suggestion (brief, pp. 48–49) that the classification is invalid because employers are not required to file similar affidavits requires little comment. "Congress may hit at a particular danger where it is seen without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States,* 320 U. S. 81, 100. That rational basis exists for distinguishing in legislative treatment between labor organizations, on the one hand, and employers on the other, is established by abundant authority. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471–472; *United States* v. *Petrillo,* 332 U. S. 1.

E. The condition contained in the Board's order is not unconstitutionally "vague" or "indefinite"

The Union contends in its brief (pp. 25–40) that Section 9 (h) and the Board's order are unconstitutional because the facts which the Union's leaders are required to aver as a condition to obtaining the benefits of the order are "vague" and "indefinite." But the Union does not even assert that none may take the oath with full knowledge that he speaks the truth. The facts are that literally thousands of leaders of labor organizations, since the passage of the Act, have filed the affidavits contemplated by Section 9 (h) without apparent qualm concerning the truth of their assertions. It may be, of course, that in particular instances individuals may doubt whether they can truthfully affirm that they do not "support" an organization which teaches overthrow of the government by illegal means. It can hardly be suggested, however, that Congress is without power to restrict the powers and privileges of the Act to organizations whose officers can and do truthfully so affirm. But, even more important, Section 9 (h) does not bar an individual from compliance merely because he may be in doubt, for example, whether a particular organization which he supports "teaches" overthrow of the government by illegal means. The Union overlooks the fact that the sole penalty provided for filing of false affidavits under Section 9 (h) is prosecution under Section 35A of the Criminal Code. That Section provides criminal penalties for "knowingly and willfully" making fraudulent or fictitious statements to any agency of the Federal Government. Clearly, no affiant could successfully be prosecuted under this Section for filing a false affidavit under Section 9 (h) unless it could be proved that he knowingly lied in making the averments contained in his affidavit. See *U. S.* v. *Gilliland,* 312 U. S. 86. If an affiant honestly believes that he is not affiliated with the Communist Party, and that he does not, as he defines the term, support any organization which to his knowledge teaches the overthrow of government by means which he knows to be illegal or unconstitutional, the affiant stands in no danger of conviction under Section 35A. See *Screws* v. *United States,* 325 U. S. 91, 101–

105. "There is no vagueness or uncertainty in his own personal definition" *N. M. U.* v. *Herzog, supra,* 78 F. Supp. at p. 172.

Moreover, as the Seventh Circuit stated in the *United Steelworkers* case, "the statute is as specific as the nature of the problem permits." Compare 54 Stat. 671, 18 U. S. C. § 10, upheld as against contentions identical to those raised by the Union in this case in *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790. Under these circumstances, the holding of the *Screws* case *supra,* as reinformed by the recent decision in *United States* v. *Petrillo,* 332 U. S. 1, establishes that the requirement of "wilfulness" which appears in Section 35A as an ingredient of the offense to be proved, preserves the statute from attack on grounds of vagueness or indefiniteness.

In any event, the requirement that a statute not be vague or indefinite applies only where the statute exacts "obedience to a rule or standard" (*Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 243) which either "forbids or requires the doing of an act" (*Connally* v. *General Construction Co.,* 269 U. S. 385, 391). Section 9 (h) does neither. No one is required to execute the affidavits contemplated by that Section. No one is prohibited from engaging in the activities set forth in that Section, or from believing in the doctrines enumerated. The statute requires only that persons who knowingly engage in such activities, or knowingly believe in the enumerated doctrines, or knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for the purpose of advancing a specific public policy, and shall not through wilfull misrepresentation attempt to obtain benefits barred to them.

Insofar as the Union's objection on these grounds stems from the allegation that Union leaders who file the affidavits may be subjected to prosecutions under Section 35A, undertaken on the basis of probable cause, it is sufficient answer that the burden of enduring lawsuits is a concomitant of life in a civilized society.

F. Section 9 (h) of the Act is not a bill of attainder

The Union contends (brief, pp. 40–46) that Section 9 (h) is constitutionally objectionable on the ground that it is a bill of attainder. Such a contention could stem only from the misapprehension under which the Union appears to labor (brief, pp. 14–15, 44–45), that the Section imposes "punishment" upon individuals for entertaining unpopular beliefs, or for being associated with unpopular organizations, and upon labor organizations for retaining officers who hold such beliefs, or continue such associations. The very cases cited by the Union demonstrate that the prohibition against bills of attainder is applicable only to laws which impose punishment. As Mr. Justice Frankfurter pointed out, concurring in the *Lovett* case (328 U. S. at 324):

> Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by government authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker* v. *New York*, 170 U. S. 189, or because he is no longer qualified, *Dent* v. *West Virginia*, 129 U. S. 114. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. *Cummings* v. *Missouri*, 4 Wall. 277, 320.

In referring to this quotation in its opinion in the *N. M. U.* case, the District Court did not, as the Union asserts in its brief, "prefer Mr. Justice Frankfurter's opinion to that of the majority" (p. 38). The crucial difference between the majority of the Court and the concurring Justice in the *Lovett* case lay not in a dispute over the validity of the doctrine of the *Cummings* case that "the deprivation of any rights * * *

previously enjoyed *may* be punishment" [italics added], but rather in differing views as to whether "the circumstances attending and the causes of the deprivation" of office in the *Lovett* case gave rise to a permissible inference that the deprivation was punitive, rather than intended to prevent a future evil. The majority of the Court inferred that the denial was punitive because no circumstances were shown which indicated that the measure was intended to be cautionary of future evils. Mr. Justice Frankfurter was unwilling so to find in the absence of positive evidence that punishment for past conduct or present beliefs was the actual motive for the deprivation.

The reason for the action of Congress in denying to Communists and to their supporters the benefits of resort to the Board, as we have demonstrated above, was not punitive. Disqualification is a preventive measure, intended to guard against the evil of misuse of power to provoke political strikes, an evil against which Congress may constitutionally guard. As stated by the Court in the *Inland Steel* case, *supra,* "Section 9 (h) does not rest upon any finding of guilt, but like the disqualification of convicted felons from medical practice in *Hawker* v. *New York* [170 U. S. 189] and the disqualification of aliens from operating pool halls in *Clarke* v. *Deckebach* [274, U. S. 392, 396–397] it operates not to impose punishment but to safeguard important public interests against potential evil" (170 F. 2d at 267). Because it is a preventive and not a punitive measure Congress did not, and was not required to find as a condition to enactment of Section 9 (h), that all Communists, or all believers in the overflow of the government by illegal means had misused the benefits of the Act to promote activities which Congress did not desire to support, just as in the cited cases the legislatures had not found that all convicted felons had engaged in immoral practices in connection with the practice of medicine, or that all aliens had created public nuisances when permitted to operate pool halls.

Since Section 9 (h) does not rest upon any finding of "guilt," the Union's charge that the Section legislates "guilt by association" must clearly fail. Congress, in Section 9 (h), ad-

dressed itself generally to the evil which it believed to exist, the danger that if access to the benefits of the Act were accorded to unions led by Communists and their supporters, some such unions might tend to hinder and frustrate effectuation of the policies of the Act. In the light of that danger, Congress was empowered to legislate as it did "unlimited by proof of the existence of the evils in each particular situation." *North American Company* case, *supra.*

G. The condition contained in the Board's order does not encroach upon freedom of thought or freedom of political affiliation

Adoption by Congress of the policy evidenced by Section 9 (h) of the Act, as embodied in the condition contained in the Board's order, is not, contrary to the Union's assertion, an attempt to prescribe what shall be orthodox in politics or economics. That policy is concerned not with belief, as such, nor with political affiliation, as such, but with the tendency of individuals, by virtue of their beliefs and affiliations, to utilize powers and privileges conferred by Congress for purposes other than those for which the powers and privileges were created. Beliefs and affiliations are thus not the targets of the statute. The target is potential conduct which Congress is authorized to exclude from the area of activities protected by the law. Belief and affiliation, it is true, are utilized as the basis for describing the class from whom such potential conduct may be expected. But, as we have shown above, it is the possession of the very beliefs and affiliations named in Section 9 (h) which leads individuals to engage in the conduct which Congress did not desire to protect. Under such circumstances the Constitution does not inhibit the use of belief and affiliation as a basis for distinction between those from whom particular conduct may be expected and those from whom it may not.

What plaintiffs' position really amounts to is that no matter how clearly it may be established that persons who subscribe to particular beliefs will tend, by virtue of those beliefs, to utilize the power and benefits conferred by Congress for purposes other that those sheltered by Congress, Congress is powerless to make possession of such belief a basis for distinction between

those to whom the powers and benefits should be granted and those from whom they should be withheld. But freedom from discriminatory treatment because of political belief and affiliation is guaranteed no more and no less stringently under the Constitution than is freedom from discriminatory treatment on the ground of race (*Takahashi* v. *Fish & Game Commission,* 334 U. S. 410; *Sipuel* v. *Board of Regents,* 332 U. S. 631); or of alienage (*Takahashi* case, *supra; Truax* v. *Raich,* 239 U. S. 33); or of consanguinity, or prior conviction of a felony, or political activity, or belief in pacifism or in anarchy. The facts that particular individuals are members of a particular race, or are aliens, or are related to a particular class of persons, or believe in pacifism or in anarchy do not normally give rise to inferences concerning future conduct by them of a type which is relevant to the usual subjects of legislation. Yet, this is not always true, as the cases cited above, pp. 17–20 *supra,* abundantly attest. The fact that an individual is an alien may give rise to a legitimate inference that he may operate a pool hall less circumspectly than a citizen (*Clarke* v. *Deckebach, supra*); that an individual has been convicted of a felony may give rise to a legitimate inference that he may be less trustworthy a doctor than one who has never been convicted (*Hawker* v. *New York, supra*); that a citizen is Japanese may give rise to a legitimate inference that he is more likely to give aid and comfort to an enemy Japan, than citizens of other extractions (*Hirabayashi* case, *supra*); that a person believes in anarchy may give rise to a legitimate inference that he will be a less desirable resident of the United States than persons who do not entertain this belief (*Turner* v. *Williams, supra*); that a person engages in political activity may give rise to an inference that he is a less desirable public servant than one who does not engage in such activity (*United Public Workers* v. *Mitchell, supra*); that an individual is a relative or friend of a licensed pilot may give rise to a legitimate inference that he may become a more competent pilot than others (*Kotch* case, *supra*); that an individual believes in pacifism may give rise to a legitimate inference that he may prove less worthy a member of the bar and a servant of the court, than those who do not entertain that belief (*Summers* case, *supra*).

The fact that an individual is a member or supporter of the Communist Party, or believes in violent overthrow of the government, likewise, may give rise to a legitimate inference concerning future conduct within the orbit of legitimate legislative concern. In *United States* v. *Schneider,* 45 F. Supp. 848, 850 (E. D. Wis.), District Judge Duffy held unconstitutional a statutory provision denying work relief to Communists on the ground that "There is no necessary connection between the political or social beliefs of a person and his distress." But where, as here, there is a "necessary connection" between membership in or support of the Communist Party, or belief in violent overthrow of government, and the uses to which the powers of union office may be put, Congress is not precluded by the Constitution from utilizing those facts as a basis for classification. Freedom of political belief or affiliation does not include the right to preclude Congress from taking cognizance of tendencies to conduct which may stem from the possession of particular beliefs or affiliations. The doctrine of freedom of belief and affiliation may not be used to blind legislatures to facts of common knowledge, or to preclude legislatures from properly exercising their constitutional power in the public interest.

The basic fallacy upon which the Union's argument rests is the assumption that Congress offered incentives to employees to rid themselves of Communist leadership solely because Congress does not approve of Communist views (Br. pp. 14–17). Once it appears, however, that "the Act was not passed because Congress disapproved of the views and beliefs of [the excluded group], but because Congress recognized that persons who entertained [those] views * * * might not utilize the powers and benefits conferred by the Act for the purposes intended by Congress" *Inland Steel* case, *supra* 170 F. 2d at 264, the base of the argument falls. Where rational basis exists to support legislation, prejudice may not be imputed to Congress as an excuse for its invalidation. *South Carolina State Highway Department* v. *Barnwell Bros., Inc.,* 303 U. S. 177, 191; *Railroad Retirement Board* v. *Alton Ry. Co.,* 295 U. S. 330; *Hirabayashi* v. *United States,* 320 U. S. 81; *U. S.* v. *Carolene Products Co.,* 304 U. S. 144; *Carolene Products Co.* v. *United States,* 323 U. S. 18.

H. The wisdom of the legislation is not a matter for judicial review

Throughout the Union's brief, there appears the suggestion that Section 9 (h) is invalid because it does not in fact aid in promoting collective bargaining, but rather promotes industrial strife, and that it does not protect employees in their full freedom of choice of bargaining agents. Anyone following labor developments in the newspapers cannot be blind to the fact that the provision played a vital role in helping some of the most important unions in the C. I. O., like the United Automobile Workers, the National Maritime Union, etc., free themselves of Communist control, a result which the C. I. O., and particularly Philip Murray, one of the petitioners herein, has openly welcomed. But for purposes of whether it was in the power of Congress to enact the provision, it is as immaterial that the provision has largely accomplished its purpose as it would have been if it had not. For these considerations are for the legislature exclusively and not for the courts. It requires no citation of authority to establish that whether legislation be deemed wise or unwise, desirable or undesirable, well or ill calculated to accomplish the ultimate legislative end in view, is not the test of its validity. Within constitutional boundaries, it is for the legislature alone to determine the purposes for which it shall create public rights and the manner of their effectuation.

CONCLUSION

For the reasons stated it is respectfully submitted that Section 9 (h) of the Act is constitutional, and the condition of the order is valid, and, subject to the condition, the order should be enforced in full.

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No. 11,921

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE V. HENSLEY, JAMES W. HENSLEY, UNITED SALES COMPANY, a corporation, and UNITED DISTRIBUTORS, INC., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona

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RULES AND REGULATIONS

No. 11,921

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona

STATEMENT OF THE PLEADINGS AND FACTS

This is an appeal by each of the appellants, defendants below, from a judgment of conviction, rendered against each upon the verdict of a jury in the United States District Court for the District of Arizona after a trial before Honorable Dave W. Ling, District Judge, and a jury, and entered against each appellant on May 3, 1948 (142-148).*

*Where figures only appear in parentheses in this Brief, they refer to page numbers of the printed Transcript of Record.

This appeal challenges the indictment upon which appellants were convicted, and the appellants contend that each count of the indictment fails to state facts sufficient to constitute an offense against the United States and therefore fails to support the judgments of conviction appealed from.

The indictment, filed November 6, 1947, contained 69 counts (2, 59).

Counts 1 to 68, inclusive, of the indictment are identical except as to the description of the then wholesale liquor dealer, the place of business, the names of the accused, the date of the offense, and the name and address on Form 52-B of the person or persons to whom distilled spirits were sent. These counts charged that certain of the defendants then being wholesale liquor dealers, as such were required to keep a record of distilled spirits disposed of by them on a form prescribed by the Commissioner, to wit, Form 52-B, to be used for the purpose of indicating among other things the name and address of the person or persons to whom distilled spirits were sent. These counts charged that in violation of Title 26 U.S.C.A. Section 2857, certain of the defendants, among which were certain of the defendants-appellants and defendant James O. Cox, as wholesale liquor dealers, on particular days, did make false entries in Form 52-B, record of distilled spirits disposed of, as to the name and address of person or persons to whom distilled spirits were sent (2).

Count 69 of the indictment charged that the defendants, namely the defendants-appellants and defendant James O. Cox, as wholesale liquor dealers, were required to keep

a record of distilled spirits disposed of by them on a form prescribed by the Commissioner, to wit, Form 52-B, to be used for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, and that in April, 1945, and continuing until January 31, 1947, the defendants in violation of Title 18 U.S.C.A. Section 88, entered into a conspiracy to violate Title 26 U.S.C.A. Section 2857, the object of which was to make false entries in Forms 52-B regarding defendant's disposal of distilled spirits as a wholesale liquor dealer, with the intent and design to hide and conceal from the United States the names and addresses of the person or persons to whom distilled spirits were sent, and the prices obtained from the sale thereof, and in furtherance of said conspiracy and to effect the object thereof, committed certain overt acts (57).

All the defendants were placed on trial upon said indictment (62). Certain of the counts were dismissed upon motion of the Government at the close of the Government's case (96), and on March 25, 1948, the jury returned its verdict upon the remaining counts (99-108) and thereby defendant James O. Cox was acquitted on all counts in which he was a defendant (101), and the other defendants, appellants here, were acquitted on certain counts and convicted on other counts. Because of the multiplicity of counts accusing different defendants at different times, and the various dispositions made of these counts, for convenience and clarity there next follows a schedule which summarizes the condition of the record in these respects:

Counts	Date of Offense and Entry	Defendants Charged	Disposition of Counts	Defendants Convicted
I 1	Apr. 14, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
II 2	Apr. 14, '45	Eugene V. Hensley James O. Cox	Acquitted	
III 3	Apr. 28, '45	Eugene V. Hensley James O. Cox	Acquitted	
IV 4	Apr. 28, '45	Eugene V. Hensley James O. Cox	Acquitted	
V 5	May 5, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
VI 6	May 18, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
VII 7	May 18, '45	Eugene V. Hensley James O. Cox	Acquitted	
VIII 8	May 22, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
IX 9	May 22, '45	Eugene V. Hensley James O. Cox	Acquitted	
X 10	June 4, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
XI 11	June 4, '45	Eugene V. Hensley James O. Cox	Acquitted	
XII 12	June 4, '45	Eugene V. Hensley James O. Cox	Acquitted	
XIII 13	July 6, '45	Eugene V. Hensley James O. Cox	Acquitted	
XIV 14	July 6, '45	Eugene V. Hensley James O. Cox	Dismissed	
XV 15	July 10, '45	Eugene V. Hensley James O. Cox	Acquitted	
XVI 16	Aug. 30, '45	Eugene V. Hensley James O. Cox	Dismissed	
XVII 17	Aug. 30, '45	Eugene V. Hensley James O. Cox	Acquitted	
XVIII 18	Sept. 20, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensl
XIX 19	Sept. 29, '45	Eugene V. Hensley James O. Cox	Acquitted	
XX 20	Oct. 11, '45	Eugene V. Hensley James O. Cox	Dismissed	
XXI 21	Oct. 11, '45	Eugene V. Hensley James O. Cox	Dismissed	
XXII 22	Oct. 11, '45	Eugene V. Hensley James O. Cox	Acquitted	
XXIII 23	July 2, '46	Eugene V. Hensley	Acquitted	
XXIV 24	July 13, '46	Eugene V. Hensley	Dismissed	

Counts	Date of Offense and Entry	Defendants Charged	Disposition of Counts	Defendants Convicted
XXV 25	July 16, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXVI 26	Aug. 2, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXVII 27	Aug. 12, '46	Eugene V. Hensley	Acquitted	
XXVIII 28	Aug. 13, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XIX 29	Sept. 4, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XX 30	Sept. 4, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXI 31	Dec. 6, '45	Eugene V. Hensley James O. Cox	Conviction	Eugene V. Hensley
XXII 32	Dec. 6, '45	Eugene V. Hensley James O. Cox	Acquitted	
XXIII 33	Dec. 6, '45	Eugene V. Hensley James O. Cox	Acquitted	
XXIV 34	Jan. 14, '46	Eugene V. Hensley	Dismissed	
XXV 35	Jan. 18, '46	Eugene V. Hensley	Acquitted	
XXVI 36	Feb. 20, '46	Eugene V. Hensley	Acquitted	
XXVII 37	Feb. 20, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
XXVIII 38	Feb. 20, '46	Eugene V. Hensley	Acquitted	
XXIX 39	Mar. 7, '46	Eugene V. Hensley	Acquitted	
L 40	Mar. 14, '46	Eugene V. Hensley	Dismissed	
LI 41	Mar. 16, '46	Eugene V. Hensley	Dismissed	
LII 42	Apr. 11, '46	Eugene V. Hensley	Acquitted	
LIII 43	Apr. 12, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
LIV 44	May 20, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
LV 45	June 28, '46	Eugene V. Hensley	Dismissed	
LVI 46	July 22, '46	Eugene V. Hensley	Conviction	Eugene V. Hensley
LVII 47	Aug. 29, '46	Eugene V. Hensley	Acquitted	
LVIII 48	Sept. 24, '46	Eugene V. Hensley	Acquitted	
LIX 49	Oct. 1, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
50	Oct. 1, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
I 51	Oct. 14, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
II 52	Oct. 15, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Dismissed	
III 53	Nov. 18, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley
IV 54	Nov. 18, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Dismissed	
V 55	Nov. 29, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley

Counts	Date of Offense and Entry	Defendants Charged	Disposition of Counts	Defendants Convicted
LVI 56	Dec. 3, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
LVII 57	Dec. 23, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley
LVIII 58	Dec. 26, '46	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
LIX 59	Jan. 6, '47	United Sales Co. Eugene V. Hensley James W. Hensley	Conviction	United Sales Co. Eugene V. Hensley James W. Hensley
LX 60	Jan. 20, '47	United Sales Co. Eugene V. Hensley James W. Hensley	Acquitted	
LXI 61	Jan. 27, '47	United Sales Co. Eugene V. Hensley James W. Hensley	Dismissed	
LXII 62	Oct. 7, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Conviction	United Distrs., Inc. Eugene V. Hensley James W. Hensley
LXIII 63	Oct. 28, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Acquitted	
LXIV 64	Nov. 25, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Acquitted	
LXV 65	Dec. 16, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Conviction	United Distrs., Inc Eugene V. Hensley James W. Hensley
LXVI 66	Dec. 23, '46	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Conviction	United Distrs., Inc Eugene V. Hensley James W. Hensley
LXVII 67	Jan. 21, '47	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Dismissed	
LXVIII 68	Jan. 30, '47	United Distrs., Inc. Eugene V. Hensley James W. Hensley	Dismissed	
LXIX 69	(Conspiracy)	Eugene V. Hensley James O. Cox James W. Hensley United Sales Co. United Distrs., Inc.	Conviction	Eugene V. Hensley James W. Hensley United Sales Co. United Distrs., Inc

Each of the appellants timely moved in arrest of judgment (112-115). These motions were denied on May 3, 1948 (141-142), and appellants were, on that day, sentenced by the District Court respectively upon the counts on which each had been convicted as follows:

> Eugene V. Hensley—Imprisonment for a period of one year and a fine of $2,000.00 on each count, sentences to run concurrently (142-143).
>
> James W. Hensley—Imprisonment for a period of six months and paying fine of $2,000.00 on each count, sentences to run concurrently (144-145).
>
> United Sales Company, a corporation—Paying a fine of $2,000.00 on each count, sentences to run concurrently (145-146).
>
> United Distributors, Inc., a corporation—Paying a fine of $2,000.00 on each count, sentences to run concurrently (146-147).

Each of the appellants immediately filed their respective notice of appeal in duplicate with the Clerk of the United States District Court (155-158), serving a copy thereof upon the United States Attorney, and the individual appellants each gave notice that they did not elect to commence service of the sentence pending appeal (148-154). Each of the individual appellants immediately made application to the District Court for admission to bail and for a stay of execution of sentence and of all proceedings for the collection of fines imposed, during dependency of appeal (147-148). The corporate appellants each immediately made application for a stay of execution of sentence and of all proceedings for the collection of fines imposed, during the dependency of appeal (147-148). The District Court denied these applications, gave as the rea-

son that there was no substantial question involved in the appeal (148). The individual appellants were remanded to the custody of the United States Marshal and held in confinement in the Maricopa County jail on May 3, 1948 (142-144).

Each of the appellants then promptly made application to the Circuit Court of Appeals for the Ninth Circuit for the relief asked the District Court pending appeal, and said Circuit Court granted the relief applied for (159-161), the order of said Circuit Court being received by the Court below on May 17, 1948 (161). Each of the appellants on that day complied with the conditions of the relief granted them pending appeal (162).

Jurisdiction of the District Court

The District Court had jurisdiction of this case because it was a criminal case instituted by a Grand Jury Indictment (2) in the United States District Court for the District of Arizona, which charged the appellants with violations of Title 26 U.S.C.A. Section 2857, and Title 18 U.S.C.A. Section 88 and is cognizable only by the United States Courts, which have exclusive jurisdiction over crimes and offenses cognizable under the authority of the United States. Jurisdiction of the District Court was invoked under the following statutes: Title 18 U.S.C. A. Section 546, Title 28 U.S.C.A. Section 41, and Title 28 U.S.C.A. Section 371, now embodied in Title 18 U.S.C.A. Section 3231.

Jurisdiction of This Court

Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C.A. Section 1291, previously Section 225.

The order of the District Court overruling the timely Motion in Arrest of Judgment made by each appellant, and the Judgment of Conviction appealed from were entered, and sentences thereon were imposed on May 3, 1948 (141-147), Notice of Appeal of each appellant was filed on May 3, 1948 (148-154). Consequently, the appeal was duly and timely taken within the time and in the manner provided by Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

This appeal raises the question of the validity of the statute invoked, i.e., Title 26 U.S.C.A. Section 2857, which statute is set out in full in Appendix A to this Brief. The pertinent provisions of this statute are as follows:

> "* * * every wholesale liquor dealer * * * shall keep daily * * * a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: * * * The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.
>
> "Every * * * wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, * * * or makes any false entry therein * * * shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years."

This appeal raises the question of the validity of regulations promulgated pursuant to that statute and upon which the indictment is predicated, i.e., Sections 194.75

to 194.81 inclusive, of Title 26, Code of Federal Regulations (118-120, 137) (pages 3001 to 3003, Supplement 1940, Book 2, Titles 21 to 29 of the Code of Federal Regulations), which regulations are set out in full in Appendix E to this Brief. The pertinent provisions of these regulations are as follows:

> "194.75 Records to be kept by wholesale liquor dealers. (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, 'Wholesale Liquor Dealer's Record,' and render monthly transcripts, Forms 52A and 52B, 'Wholesale Liquor Dealer's Monthly Report,' and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B).'
>
> "(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon * * *."

STATEMENT OF THE CASE

Appellants were convicted upon certain counts of a 69 count indictment returned against them, and appeal from the respective judgments of conviction entered thereon. Each of the counts for its validity depends upon Title 26 U.S.C.A. Section 2857 and the regulations promulgated pursuant thereto, namely, Sections 194.75 to 194.81 inclusive, of Title 26, Code of Federal Regulations, which are set out verbatim in the Appendix to this Brief, the statute in Appendix A and the regulations in Appendix E.

Questions Involved

Appellants, and each of them, contend that each count of the indictment fails to charge an offense against the United States, and, therefore, fails to support the judgment of conviction appealed from for the following reasons:

1. The indictment fails to charge the commission of a crime.

2. Title 26 U.S.C.A. Section 2857 does not require that a wholesale liquor dealer keep a record for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, or to make an entry in such record of such name and address, therefore, the statute does not support a conviction upon the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses.

3. Title 26 U.S.C.A. Section 2857 does not constitutionally empower or constitutionally delegate power to the Commissioner of Internal Revenue alone, or with the approval of the Secretary, to promulgate a regulation requiring the use of a form, or prescribe a form, wherein wholesale liquor dealers must by an entry indicate the name and address of the person or persons to whom distilled spirits were sent, therefore, the statute does not support a conviction upon the indictment charging the making of false entries in such record as to the names and

addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses.

4. The regulations promulgated by the Commissioner of Internal Revenue, Sections 194.75 to 194.81 inclusive, of Title 26, Code of Federal Regulations, pursuant to Title 26 U.S.C.A. Section 2857, do not require that a wholesale liquor dealer make an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, therefore, the statute does not support a conviction upon the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses.

5. That portion of Title 26 U.S.C.A. Section 2857 upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

6. That portion of the regulations of the Commissioner, Sections 194.75 to 194.81 inclusive, of Title 26 Code of Federal Regulations, upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

How Questions Are Raised

The issues of law raised in this appeal are raised by several motions and objections made by each of the appellants as follows:

By a motion to dismiss the indictment made at the close of the opening statement of the United States Attorney when the trial began, which motion asserted that the indictment failed to state a public offense (63-64, 117), which motion was renewed at the close of the prosecution's case (94-96, 133-138) and at the close of the whole case (96-97, 138), all of which motions were denied by the District Court.

By an objection and continuing objection to the indictment and to the introduction in evidence of Form 52-B, which objection asserted in substance that the indictment failed to state a public offense and challenged the validity of the regulations promulgated under Title 26 U.S.C.A. Section 2857, the statute invoked, concerning Form 52-B to have the effect of creating or constituting a crime by reason of a false entry therein as to the name and address of the person or persons to whom distilled spirits were sent (66-67, 121-132), which objections were renewed at the close of the prosecution's case (94-96, 133-138) and at the close of the whole case (97, 138), all of which objections were overruled by the District Court.

By a motion at the close of the prosecution's case to strike each and every Form 52-B in evidence, which motion asserted in substance the same grounds as those for the above mentioned objection to the indictment and to the introduction in evidence of Forms

52-B (94-96, 133-135), which motion was renewed at the close of the whole case (97, 138), all of which motions were denied by the District Court.

By a motion for judgment of acquittal on each and every count made at the close of the prosecution's case, which motion asserted in substance the same grounds as those for the above mentioned objection to the indictment and to the introduction in evidence of Forms 52-B (94-95, 135-137), which motion was renewed at the close of the whole case (97, 138), all of which motions were denied by the District Court.

By a motion in arrest of judgment on each and every count on which convicted, which motion asserted that none of the counts of the indictment upon which the jury returned a verdict of guilty stated facts sufficient to constitute an offense against the United States, and none stated an offense against the United States (112-115, 141-142), which motion was denied by the District Court.

By these motions and objections, the following question was raised which is involved on this appeal: Does the indictment, or any count thereof, state facts sufficient to constitute an offense against the United States?

SPECIFICATION OF ERRORS

I.

The Court erred in denying defendants-appellants' motion to dismiss the indictment made at the close of the opening statement of the United States Attorney when

the trial began, renewed and denied at the close of the prosecution's case, renewed and denied at the close of the whole case, which motion asserted that the indictment failed to state a public offense, because no count of the indictment states facts sufficient to constitute an offense against the United States.

II.

The Court erred in overruling defendants-appellants' objection and continuing objection to the indictment and to the introduction into evidence of Form 52-B, renewed and denied at the close of the prosecution's case, and renewed and denied at the close of the whole case, which objection asserted that the indictment failed to state a public offense, and that the statute, Title 26 U.S.C.A. 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, because no count of the indictment states facts sufficient to constitute an offense against the United States and the statute, 26 U.S. C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent.

III.

The Court erred in denying defendants-appellants' motion to strike each and every Form 52-B, made and renewed at the close of the prosecution's case, and renewed and denied at the close of the whole case, which objec-

tion asserted that the indictment failed to state a public offense, and that the statute Title 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, because no count of the indictment states facts sufficient to constitute an offense against the United States and the statute 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent.

IV.

The Court erred in denying defendants-appellants' motion for judgment of acquittal on each and every count of the indictment, made at the close of the prosecution's case, and renewed and denied at the close of the whole case, which objection asserted that the indictment failed to state a public offense, and that the statute, Title 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, because no count of the indictment states facts sufficient to constitute an offense against the United States and the statute, 26 U.S.C.A. Section 2857, upon which each count of the indictment was predicated does not require the making of an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent.

V.

The Court erred in denying defendants-appellants' respective motions in arrest of judgment on each and every count on which convicted, which motions asserted that none of the counts of the indictment upon which the jury returned a verdict of guilty stated facts sufficient to constitute an offense against the United States, and none stated an offense against the United States, because no count of the indictment states facts sufficient to constitute an offense against the United States, and none did state an offense against the United States.

ARGUMENT

(a) Title 26 U.S.C.A. Section 2857 does not require that a wholesale liquor dealer keep a record for the purpose of indicating the name and address of the person or persons to whom distilled spirits were sent, or to make an entry in such record of such name and address, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.

(Specification of Errors I, II, III, IV, V)

The pertinent parts of Title 26 U.S.C.A. Section 2857, the whole of which is set out in Appendix A, are as follows:

> "* * * every wholesale liquor dealer * * * shall keep daily * * * a record of distilled spirits received and

> disposed of by him, and shall render under oath correct transcripts and summaries of such records. * * * The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. Every * * * wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, * * * or makes any false entry therein * * * shall pay a penalty of $100 and, on conviction shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years."

The "record" required by the statute is "a record of distilled spirits received and disposed of." Nowhere in the statute is it required that there be recorded "the name and address of the person or persons to whom distilled spirits were sent," or requiring that an entry of such name and address be made in that "record." The statute does not denounce as an offense the making of a false entry as to the name and address of the person to whom distilled spirits were sent.

That a record be kept, and entries made therein setting forth the name and address of the person to whom distilled spirits were sent, is a command neither within the express terms of the statute nor encompassed within the ordinary meaning of the words employed by the command of the statute, because the phrase "record of distilled spirits received and disposed of by him" does not convey or connote the idea that this "record" must also contain an entry indicating "the name and address of the person or persons to whom distilled spirits were sent."

The words of the statute are ordinary words of common speech and "are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken." *U. S. v. Bhagat Singh Thind,* 261 U.S. 204, 209; 43 S.Ct. 338, 340; 67 L.Ed. 616, 617; *McBoyle v. U. S.,* 283 U.S. 25, 27; 51 S.Ct. 340, 341; 75 L.Ed. 816, 818. The "record" required is "a record of distilled spirits," having but two entries, one, "distilled spirits received," and the other, "distilled spirits * * * disposed of." There is nothing in the meaning of the words used even faintly suggesting that "a record" is, as the indictment contends, "for the purpose of indicating, among other things, the name and address of the person or persons to whom distilled spirits were sent."

Were the Government to command wholesale milk dealers: "Keep a daily record of milk received and disposed of," every milk dealer would write: Milk received Tuesday—100 gallons; Milk disposed of Tuesday—100 gallons. No dealer would suppose that by such a command he was required to write: Milk disposed of Tuesday —10 gallons sent to John Jones, 275 Central Ave., Phoenix, Ariz.; 10 gallons sent to Tom Smith, corner Cave Creek Road and E. Dunlap, Sunnyslope, Phoenix, Arizona, etc.

The statute in juxtaposition employs the terms "received" and "disposed of" as terms of direct opposite meanings, or more accurately as precise antonyms. In the proviso clause of the statute, the phrase "sent out" is used as a synonym for "disposed of" and employed as an antonym for "received." There is nothing in the current meaning of the terms "daily," "record of distilled spirits," "received," and "disposed of" or "sent out," or in their etymology, which supports any meaning other

than that a wholesale liquor dealer shall sum up in writing each day the quantity of the spirits received, and the quantity disposed of. *The command of the statute is to keep a daily record of what was received and what was disposed of, not from whom it was received and to whom it was sent.*

Congress did not write such a command into the statute. To the contrary, having before it in the statute just such a command, Congress in 1936 specifically struck it out, which makes crystal clear the fact that the statute in question does not require the making of an entry "indicating the name and address of the person or persons to whom distilled spirits were sent."

The original statute (set out in full in Appendix D of this Brief) was enacted by the Act of June 20, 1868, Section 45, 15 Stat. 143, ultimately becoming Section 3318 of the Revised Statutes.* Rev. Stat. 3318 as it was prior to the 1936 amendment is set forth in full in Appendix B. Prior to the 1936 amendment, Rev. Stat. 3318 required that every wholesale liquor dealer "shall provide a book to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue" and "enter in such book, and in the proper columns respectively prepared for the purpose * * * the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and frac-

*Amendments to the original 1868 Act are unimportant and not material to the issue at bar. By the Act of February 27, 1877, Chapter 69, Section 1, 19 Stat. 248, two minor corrections were made. By the Act of March 1, 1879, Chapter 125, Section 2, 20 Stat. 329, the details of the monthly transcript and the procedure for forwarding the same to the collector were added.

tions of a gallon at proof, and, if in the original packages in which they were received, the name of the distiller and the serial number of the package.'' But by the Act of June 26, 1936, Chapter 830, Title IV, Section 411, 49 Stat. 1962 (set forth in full in Appendix C), these requirements were specifically deleted and eliminated by Congress, and the pertinent statutory requirements became, as they now are in 26 U.S.C.A. 2857, viz., ''every * * * wholesale liquor dealer shall keep daily, at his place of business, a record of distilled spirits received and disposed of by him.'' The decisive effect of the 1936 amendment is clearly shown when the entries required by Rev. Stat. 3318 before the 1936 amendment are compared to those specified by Rev. Stat. 3318 as amended in 1936, viz.:

Columnar Entries Specified by R.S. 3318 Prior to 1936 Amendment	Entries Specified by R.S. 3318 Subsequent to 1936 Amendment, and as Continued in Title 26 U.S.C.A. Section 2857
''the day when''	''daily''
''the name and place of business of the person or firm to whom such spirits are to be sent''	
''if in the original packages in which they were received, the name of the distiller''	
''the quantity * * * of such spirits''	''distilled spirits * * * disposed of''
''kind or quality of such spirits''	
''the number of gallons and fractions of a gallon at proof''	
''if in the original packages in which they were received * * * the serial number of the package''	

It is the rule that where the legislative body, in amending an act, omits requirements expressed in the original act in simple language, plain in its meaning, the presumption of law is that the requirements no longer exist, at least in the absence of express words showing that the requirements were intended to continue. "Neither ambiguous nor uncertain language will prevail against such an express omission." *U. S. v. One Ice Box* (D.C. Ill.) 37 Fed. 2nd 120, 123, citing cases.

We are here dealing with a highly penal statute, which, as few federal criminal statutes do, imposes mandatory punishment if its terms are disobeyed. Such a statute is to be strictly construed. *Connolly v. U. S.* (C.C.A. 9) 149 Fed. 2d 666, 669. So far as the statute is concerned, by the 1936 amendment both the requirement of making an entry, and the offense of making a false entry, as to the name and address of the person to whom distilled spirits were sent, were both specifically eliminated and abolished by positive act of the Congress.

It is manifest that 26 U.S.C.A. Section 2857 does not command that an entry be made of the "name and address of the person or persons to whom distilled spirits were sent"; nor does the statute establish as an offense the false making of such an entry. No such words are in the statute; and no words in the statute connote or have any such meaning. Thus, the offenses charged in the indictment are not offenses under the statute upon which they are predicated.

The omission of the statute to specify as offenses, that which the indictment alleges as offenses, cannot be supplied by interpretation, implication or intendment. No

allegation in an indictment can restore to a penal statute that which the Congress has deleted. Nor can the statute be expanded by a pleading or by judicial construction so as to constitute offenses, that which the Congress has not clearly and plainly specified as offenses. "Judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness * * *." When interpreting a criminal statute the court may "not depart from its words and context." *Pierce v. U. S.*, 314 U.S. 306, 311; 62 S.Ct. 237, 240; 86 L.Ed. 226, 231.

To sustain this indictment requires more than interpretation of doubtful terms, a type of interpretation which itself would be contrary to the rule that in the construction of a penal statute all reasonable doubts are to be resolved in favor of the accused in order not "to make every doubtful phrase a dragnet for penalties." *Harrison v. Vose,* 9 Howard 372, 378; 50 U.S. 372, 378; 13 L.Ed. 179, 182. The fact is that to sustain this indictment requires that one or the other of two entirely new and lengthy phrases on a new subject matter be written into the statute. *One:* Unless following the phrase "a record of distilled spirits received and disposed of by him," there be written into the statute the phrase "including the name and address of the person or persons to whom distilled spirits were sent," the statute does not support that which the indictment charges are offenses. *Two:* If not that, then following the phrase "such records in the form prescribed by the Commissioner" there must be inserted the phrase "included in which shall be entered the name and address of the person or persons to whom distilled spirits were

sent." Only the legislature has power to so amend a penal statute, as the authorities have long since made clear.

"Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for." *U. S. v. Noveck,* 271 U.S. 201, 204; 46 S.Ct. 476, 477; 70 L.Ed. 904, 906.

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.'" *Todd v. U. S.,* 158 U.S. 278, 282; 15 S.Ct. 889, 890; 39 L.Ed. 982.

"To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those enumerated." *U. S. v. Wiltberger,* 5 Wheat. 76, 95; 18 U.S. 76, 95; 5 L.Ed. 37.

"Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive." *U. S. v. Weitzel,* 246 U.S. 533, 543; 38 S. Ct. 381, 383; 62 L.Ed. 872, 875.

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. * * * Before one may be punished, it must appear

that his case is plainly within the statute; there are no constructive offenses." *U. S. v. Resnick,* 299 U.S. 207, 209; 57 S.Ct. 126, 127; 81 L.Ed. 127, 129.

Fasulo v. U. S., 272 U.S. 620; 47 S.Ct. 200; 71 L.Ed. 443;

U. S. v. Bathgate, 246 U.S. 220; 38 S.Ct. 269; 62 L.Ed. 676.

(b) Title 26 U.S.C.A. Section 2857 does not constitutionally empower or constitutionally delegate power to the Commissioner of Internal Revenue alone, or with the approval of the Secretary, to promulgate a regulation requiring the use of a form, or prescribe a form, wherein wholesale liquor dealers must by an entry indicate the name and address of the person or persons to whom distilled spirits were sent, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses, does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.

(Specifications of Error I, II, III, IV, V)

Having shown that the offenses charged in the indictment are not found within the language or meaning of the terms employed by the statute, query whether the statute constitutionally empowered or delegated power to the Commissioner to prescribe a form or a regulation by means of which a wholesale liquor dealer is required under pain of punishment to make an entry in the "record of distilled spirits received and disposed of by him" indicating the name and address of the person or persons to whom distilled spirits were sent. We believe it clear

that the statute gives the Commissioner, alone or with the Secretary, no such power.

The statute after defining the record, i.e., "record of distilled spirits received and disposed of" provides as to the authority of the Commissioner as follows:

> "That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe."
>
> "Every * * * wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, * * * or makes any false entry therein, * * * shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years."

We are not here dealing with that type of statutory delegation of regulation making power, where an administrator is authorized in blanket fashion to issue regulations to carry out the purposes of an Act, and violation of his regulations are made crimes by the Act.*

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*For example such as the Act of 1897, c. 2, 30 Stat. 36, which provided that the Secretary "may make all such rules and regulations * * * as will insure the objects of such reservation, namely, to regulate their occupancy and use and preserve the forest thereon from destruction, and any violation of the provisions of this Act or such rules and regulations of the Secretary shall be punished as prescribed in Section 5388 of the Revised Statutes as amended."

Nor is this a case where Congress in equally blanket fashion authorizes an administrator to issue regulations requiring such records or reports as the administrator may feel are necessary or proper, and establishes it as a crime the making of a false entry in any record or report required by the regulations.†

Under 26 U.S.C.A. 2857, the Commissioner is not empowered to require that a wholesale liquor dealer keep a record which the Commissioner for the time being happens to think would contain interesting information, although the contention of the prosecution comes down to just that.

The Commissioner has been delegated power only to prescribe where the "record of distilled spirits received and disposed of" shall be kept, and the *form* in which "such records" shall be kept; his authority extends to matters of form only, not to matters of content and substance. The statute itself descends to details and specifies all matters of content and substance. It prescribes when the record is to be made, i.e., "daily"; its prescribes what is to be in the "record," i.e., "distilled spirits received and disposed of"; it prescribes where the record is to be kept, being at the wholesaler's place of business, "provided, that the Commissioner may in his discretion require

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†For example such as 50 U.S.C.A., War Appendix Sections 921, 922, 925, where the OPA Administrator was given blanket authority by Section 921(d) to "from time to time issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act," and by Section 922(b) authorized "The Administrator * * * by regulation or order to require any person who is engaged in the business of dealing with any commodity * * * to make and keep records and other documents," and by Section 925(b) specified punishment for "any person who makes any statement or entry false in any material respect in any document or report required to be kept" under Section 922.

such record to be kept at the place where the spirits are actually received and sent out."

However, the indictment contends that the Commissioner may add by regulation the requirement that "such record" must also contain an entry "indicating the name and address of the person or persons to whom distilled spirits were sent." But the Commissioner may not, because the power conferred to make regulations must be exercised within the powers delegated. The requirements of the statute may not be extended, modified, amended or added to by regulation. *Campbell v. Galeno Chemical Co.,* 281 U.S. 599; 50 S.Ct. 412; 74 L.Ed. 1063; to the same effect: *Riverdale Co-Operative Creamery Assn. v. Commissioner of Internal Revenue* (C.C.A.9), 48 Fed. 2d 711, 714; *Kobilkin v. Pillsbury, et al.,* (C.C.A. 9) 103 Fed. 2d 667, 670. Here where the statute has defined the content of the record and thus specified the subject, i.e., "distilled spirits," the Commissioner is precluded from extending it to other subjects, i.e., "names and addresses." Cf. *Peoria & P. U. R. Co. v. U. S.,* 263 U.S. 528, 534-535; 44 S.Ct. 194, 196; 68 L.Ed. 427, 430; to the same effect: *U. S. v. Fruit Growers' Express Co.,* 279 U.S. 363, 370; 49 S.Ct. 374, 377, 73 L.Ed. 739, 743. For, "where, as in this case, the provisions of the Act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland v. Helvering,* 298 U.S. 441, 447; 56 S.Ct. 767, 770; 80 L.Ed. 1268, 1273.

It cannot be seriously argued that the sentence, "The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner * * * may prescribe," delegates to the Commissioner the authority to promulgate general regulations

by which he may require that a wholesaler keep a record of the names and addresses of the person or persons to whom distilled spirits were sent. Obviously, it does not. But for sake of argument, assume it does. Still that does not support the case for the prosecution because the statute has not made it an offense to violate regulations of the Commissioner, nor are penalties prescribed for such a violation.

In this respect, the case is clearly within the principle laid down in *U. S. v. Eaton,* 144 U.S. 677; 12 S.Ct. 764; 36 L.Ed. 591. In the Eaton case the prosecution relied upon Section 20 of the Act there in question, which empowered the Secretary to make "all needful * * * regulations" for enforcing the Act. But the Act itself did not require an oleomargarine dealer, as it did a manufacturer, to "keep such books, render such returns * * * as the Commissioner * * * may, by regulation require." Nor did the statute prescribe a penalty for violation of a regulation of the Commissioner. Pursuant to the very broad authorizing language of Section 20, the Commissioner had promulgated a regulation requiring a dealer to "keep a book (form 61) and make a monthly return on form 217, showing the oleomargarine received by them, and from whom received; also the oleomargarine disposed of by them, and to whom sold or delivered." But the Supreme Court held that the failure of a dealer to do so did not constitute an offense because the Commissioner could not require more than the statute itself required.

The precise language of the statute at bar bears further study. The statute provides "every wholesale liquor dealer * * * shall keep daily * * * a record of distilled spirits received and disposed of by him, and shall render under

oath correct transcripts and summaries of *such records*'' (emphasis added). Note that the statute has not only specified the contents of the records, but it has in the very same sentence defined the term ''such records.'' Note now the definition of the offense: ''Every * * * wholesale liquor dealer who refuses or neglects to keep *such records* in the *form prescribed* by the Commissioner * * * or makes any false entry therein'' (emphasis added). It is obvious that the offense proscribed is not that of making a false entry in a record, the contents of which are prescribed by the Commissioner, because in relation to the criminal sanctions, the statute has not even purported to give authority to the Commissioner to specify the contents of the record, but only the *form,* i.e., the physical arrangement of the contents which the statute itself has defined. The statute is utterly plain; it first specified exactly the content of the record, and then it defined exactly the term ''such records.'' Thus the penal provision by using the defined phrase ''such records'' refers back to the content of the record first specified, and hence the crime is making a false entry ''of distilled spirits received and disposed of,'' not making a false entry as to names and addresses of the person or persons to whom distilled spirits were sent, for the statute does not specify that ''such record'' shall contain anything but ''daily * * * distilled spirits received and disposed of.'' The statute having specified the content of the record, the Commissioner is without power to add to it. *Williamson v. U. S.,* 207 U.S. 425; 28 S.Ct. 163; 52 L.Ed. 278; *Waite v. Macy,* 246 U.S. 606, 608-609; 38 S.Ct. 395, 396; 62 L.Ed. 892, 894; *Merritt v. Welsh,* 104 U.S. 694; 26 L.Ed. 896.

In principle, the question is identical to that in *Morrill, Collector, etc. v. Jones,* 106 U.S. 466, 1 S.Ct. 423, 27 L.Ed. 267, a case frequently and currently cited as fundamental authority. There the statute provided that "all animals alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty) upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe." Under this apparently very broad authority, the Secretary's regulation provided that before a Collector admitted such animals free he must, among other things, "be satisfied that the animals are of superior stock." The Collector demanded customs duties of Jones because he was not satisfied the animals were of "superior stock." The Supreme Court held the Secretary "cannot by his regulations alter or amend a revenue law," and that the regulation in question "was in excess of the power of the Secretary." If then in this civil case, the Secretary may not require proof beyond that designated by the statute, i.e., "specially imported for breeding purposes," *a fortiori* in the criminal case at bar, he may not require that the record contain information beyond that designated by the statute, i.e., "distilled spirits received and disposed of."

In the case at bar the offense is created by the regulation, not by the statute. Under the contention of the indictment, the statute is not the final arbiter as to which acts shall be criminal and which shall not. To the contrary the Commissioner is, for, under the theory of the indictment, he may at his pleasure by regulation expand and contract, modify and alter the content of the "record" and the entries which are to be made in "a record of distilled spirits received and disposed of," and which

entries, if false, constitute offenses. In this case, it is not the law, but the action of the Commissioner for the time being, which is final and decisive, even though the statute invoked does not delegate to the Commissioner plenary rule making power.

If the Commissioner may require that to the "record of distilled spirits received and disposed of" must be added an entry indicating "the name and address of the person or persons to whom distilled spirits were sent," query: May he not require that person's phone number, his home address, the address of his warehouse, his political affiliations, or, for that matter, his religion? And if not, why not? For once it is decided that "of distilled spirits received and disposed of" is not a specification of the contents of the "record" and is not a limitation upon the power of the Commissioner, and that, therefore, the Commissioner may require that to that "record" be added entries "indicating the name and address of the person or persons to whom distilled spirits were sent," then there is no limit to what the Commissioner may require in "a record of distilled spirits received and disposed of."

The vice of the statute exposed by the putting of these cases cannot be glossed over on the theory that the cases are imaginary but not probable because no reasonable Commissioner would require any such entries to be made in the "record," and therefore this power, claimed by the indictment, to say what the "record of distilled spirits received and disposed of" shall contain, would not be abused. To take that position is to ignore the condition and essence of the principles of law involved. The essence of the law in this respect is, not that such power will not be abused, but that no person shall be clothed with any

such power, under the color or pretext of which he is given the opportunity of thus establishing offenses without clear legislative basis.

That the Commissioner has no such power is clear. Under the statute his power is restricted to prescribing the *form* of the "record of distilled spirits received and disposed of" and where "such records" are to be kept. He has no power to prescribe the content of "such records" nor what entries "such record" shall contain. He is given no authority to add by regulation a requirement that "such record" shall also contain the "name and address of the person or persons to whom distilled spirits were sent." The record required by the statute is "of distilled spirits received and disposed of." The word "of" makes clear that in the record is to be entered "distilled spirits received and disposed of," and not a lot of names and addresses. Had names and addresses been wanted, the statute would have so provided, just as it did prior to the 1936 amendment when this very requirement was stricken out. The statute does not empower the Commissioner to create by regulation the offense of making a false entry as to the name and address of the person to whom distilled spirits were sent. Under the statute there is no such offense, and the statute does not delegate to the Commissioner the authority to create such an offense by regulation.

To require that "such records" contain the name and address of the person or persons to whom distilled spirits were sent, is to add to and enlarge the statute. Under the construction contended for by the indictment, the Commissioner would have power to enlarge the statute at

will. Such power is not regulation; it is legislation and the Commissioner is forbidden to legislate.

U. S. v. United Verde Copper Co., 196 U.S. 207, 215; 25 S.Ct. 222, 225; 49 L.Ed. 449, 452;

U. S. v. George, 228 U.S. 14; 33 S.Ct. 412; 57 L.Ed. 712;

Lynch v. Tilden Produce Co., 265 U.S. 315, 44 S.Ct. 488; 68 L.Ed. 1034;

M. Kraus & Bros. v. U. S., 327 U.S. 614, 66 S.Ct. 705; 90 L.Ed. 894.

(c) The regulations promulgated by the Commissioner of Internal Revenue, Sections 194.75 to 194.81 inclusive of Title 26, Code of Federal Regulations pursuant to Title 26 U.S.C.A. Section 2857, do not require that a wholesale liquor dealer make an entry in Form 52-B indicating the name and address of the person or persons to whom distilled spirits were sent, therefore the indictment charging the making of false entries in such record as to the names and addresses of the person or persons to whom distilled spirits were sent, and charging a conspiracy to violate this statute by making false entries as to such names and addresses, does not state facts sufficient to constitute an offense against the United States and said statute does not support the judgments of conviction.

(Specifications of Error I, II, III, IV, V.)

It is the contention of the prosecution that pursuant to 26 U.S.C.A. Section 2857, the Commissioner promulgated the regulations of Sections 194.75 to 194.81 inclusive of Title 26 of Code of Federal Regulations, and that thereby the appellants, as wholesale liquor dealers, were required to make an entry in "a record of distilled spirits received and disposed of" indicating the name and address of the person or persons to whom distilled spirits were sent, and,

accordingly, making a false entry of such name and address constitutes an offense against the United States under 26 U.S.C.A. Section 2857.

These regulations, Sections 194.75 to 194.81, Title 26 Code of Federal Regulations, were specified and identified at the trial as the ones which promulgated and prescribed Form 52-B, and which required the use of Form 52-B by wholesale liquor dealers (117-120) and, as such, were introduced in evidence (137). The regulations at the end of each specifically set forth that the statutory authority for their promulgation is 26 U.S.C.A. 2857 (Appendix E). Government's Exhibit 15 in evidence (109) contains the headings that were on each respective Form 52-B in evidence (137-138), which Forms 52-B were admitted in evidence over appellants' continuing objection (121-132, 132). It was upon these regulations that Forms 52-B became the documentary predicate for both the offenses charged in the indictment (2-3) and the proof of the false making of entries indicating the name and address of the person to whom distilled spirits were sent (121-132). These regulations are set out in full in Appendix D.

The pertinent parts of the regulations are as follows:

> "194.75. Records to be kept by wholesale liquor dealers. (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, 'Wholesale Liquor Dealer's Record,' and render monthly transcripts, Forms 52A and 52B, 'Wholesale Liquor Dealer's Monthly Report,' and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B).'
>
> "(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indi-

cated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur:''

As previously shown, nowhere in 26 U.S.C.A. Section 2857 is it required that ''a record of distilled spirits received and disposed of'' contain any entry indicating the name and address of the person to whom distilled spirits were sent. The regulations are equally silent; they do not prescribe or require that in Form 52-B an entry be made of the name and address of the person to whom distilled spirits were sent. The regulations merely say, ''Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings on the various columns, and in accordance with the instructions printed thereon. * * *'' Nowhere in the regulations is Form 52-B or the form of Form 52-B prescribed; nowhere in the regulations are the headings prescribed.

There is no legal basis for the offenses charged, either in the statute, or in the regulation, for in neither case is an entry prescribed and required ''indicating the name and address of the person or persons to whom distilled spirits were sent.'' No case has been found where criminal liability is made to depend, not upon statute, not upon a regulation having clear legislative basis, but upon unspecified headings on a form which itself is unprescribed but only referred to by the regulations relied upon to support the charge of the commission of offenses. Printed headings on a form, additional to the expressed items of the regulation do not have the force of law. *U. S. v. Lamson,* 162 Fed. 165, 168.

Comparative inspection of Rev. Stat. 3318 before amendment, and Title 26, U.S.C.A. Section 2857 as it was after amendment, and Form 52-B is revealing.

Columnar Entries Specified by Rev. Stat. 3318 prior to 1936 Amendment. (Appendix B)	Columnar Headings on Form 52-B (Gov. Exhibit 15, T.R. 109)	Entries Specified by Rev. Stat. 3318 Subsequent to 1936 Amendment (Appendix C), and as continued in Title 26 U.S.C.A. Section 2857 (Appendix A)
"The day when"	Date Removed	"daily"
"the name and place of business of the person or firm to whom such spirits are to be sent"	To Whom Sent Name Address	
"if in the original packages in which they were received, the name of the distiller"	By Whom Distilled, Rectified, or Bottled (Shown on case) Name Registry or Permit No. State or Country	
"the quantity * * * of such spirits"	Number of Cases	"distilled spirits * * * disposed of"
"kind or quality of such spirits"	Quantity of Spirits Whiskey (Wine Gallons)	
"the number of gallons and fractions of a gallon at proof"	Gin (Wine Gallons) Brandy (Wine Gallons) Other Distilled Spirits Kind (Wine Gallons)	
"if in the original packages in which they were received * * * the serial number of the package"	Inclusive Serial Nos. of cases	

It is thus obvious that the Treasury Department officials are attempting to write back into the statute all that which the Congress has by positive act stricken out, and purport to do so by the extra legal and vague device of promulgating a regulation requiring wholesalers to make "daily entries * * * on Record 52 * * * as indicated by the headings on the various columns." Thereby the posi-

tive action of the Congress is circumvented. By this means offenses are attempted to be created.

The vice of the matter is thrown in sharp relief when the statute and regulations in the case at bar are compared to the oleomargarine acts and regulations, where it is apparent that names and addresses were wanted. Section 5 of the Act of August 2, 1886, 24 Stat. 210, Title 26 U.S.C.A. Section 2302 (c) in pertinent part provides:

> "Every manufacturer of oleomargarine * * * shall keep such books, and render such returns of materials and products, * * * as the Commissioner, with the approval of the Secretary, may, by regulation, require."

Pursuant thereto, the Commissioner prescribed in Section 310.24, Title 26, Code of Federal Regulations, as follows:

> "310.24. Records (a) Manner of keeping * * *.
>
> "(b) Items. The record must show * * *.
>
> "(3) The number of pounds in each lot disposed of, the name of the consignee, the address to which delivered, and the date of the shipment."

Section 6 of the Act of August 2, 1902, 32 Stat. 197, Title 26 U.S.C.A. Section 2303(c), in pertinent part provides:

> "Wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the Commissioner, with the approval of the Secretary, may, by regulation require;"

Pursuant thereto, the Commissioner prescribed in Section 310.42, Title 26, Code of Federal Regulations, as follows:

> "310.42 Records—(a) Manner of keeping * * *.
>
> "(b) Items. The record must show:

"(1) The number of pounds in each consignment of oleomargarine received, the name and address of the consignor, and the date of receipt.

"(2) The number of pounds in each lot disposed of, the name of the consignee, the address to which delivered, and the date of shipment."

The old regulations under the Act of August 2, 1902, supra, as cited in *U. S. v. Lamson* (1908), 165 Fed. 80, 81, provided:

"Wholesale dealers in oleomargarine will make monthly returns on form 217 (with inside sheets when needed to complete detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received from the manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned * * *."

When these provisions are compared to those at bar, the complete failure of the statute at bar to clothe the Commissioner with authority to do that which he has here attempted, is exposed. Unlike the oleomargarine statutes, supra, the statute at bar does not clothe the Commissioner with plenary power to command the keeping of such books and returns as the Commissioner for the time being may require. Comparative inspection makes also obvious the fatal omission of the regulations at bar to command that a wholesale liquor dealer make an entry "indicating the name and address of the person or persons to whom distilled spirits were sent." Unlike the oleomargarine regulations, supra, the regulations at bar do not command that the record contain names and addresses.

Moreover, the oleomargarine regulations, supra, make it rather clear that in order to legally require the keeping of a record of "the name and address of the person or persons to whom distilled spirits were sent," the legal command to do so must be just that and in so many words. Such a command is not to be implied from the command that there be kept "a record of distilled spirits * * * disposed of."

The law is clear; it is not an offense under Title 26 U.S.C.A. Section 2857 to falsely make an entry as to the name and address of the person to whom distilled spirits were sent. Nor does this regulation create such an offense, nor can it legally.

Decisive is *Viereck v. U. S.,* 318 U.S. 236; 63 S.Ct. 561, 562; 87 L.Ed. 734. There the prosecution contended, as the indictment here contends, that the Secretary had been empowered under the Act there in question, to prescribe a form, and to promulgate all "necessary" regulations. There, as here, it was contended that the Secretary by prescribing a form, thereby in legal effect lawfully prescribed and required the entry of such details as by the heading on the form were demanded to be stated. There, as here, it was contended that, under the authority of the Act which required "such details required under this Act as the Secretary shall fix, of the activities of such persons as agent of a foreign principal" and under his authority "to prescribe such rules, regulations and forms as may be necessary to carry out this Act," that the Secretary's requirement that the person give a "comprehensive statement of nature of business of registrant"

was such as to make a failure of a registrant to state the various activities he was engaged in an offense under the Act which prescribed omission to state a material fact required to be stated. And there, as ought be the case here, the court held the Act did not command, or authorize the Secretary to command, registrants to make any mention or supply any details beyond those specified by the Act. The Supreme Court squarely held that the command of the statute requiring a registrant to file "details * * * of the activities of such person as agent of a foreign principal" could not be expanded by a form or regulation of the Secretary so as to require inclusion of details of activities other than as such agent. The Secretary had by prescribing a form and regulation asked more than the statute demanded, and the conviction for omitting to provide it was reversed.

In the case at bar where the statute prescribes "a record of distilled spirits received and disposed of," just as held in the *Viereck case,* that is at once a designation of the contents of the record and a limitation on the power of the Commissioner. In the words of the *Viereck case* that limitation cannot "be disregarded in determining what statement the statute, and any regulation which it authorizes the Secretary to promulgate, called on petitioners to make." Here, as there, the Commissioner cannot override the statute by prescribing forms or regulations requiring more or different entries than the statute itself requires.

In the *Viereck decision,* the Supreme Court reaffirmed the principles of law decisive to the case at bar, viz.:

"One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." (citing cases) (318 U.S. 241-242) "Unless the statute fairly read, demands the disclosure of the information * * * he cannot be subjected to the statutory penalties." (318 U.S. 242)

"The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem." (318 U.S. 243)

"Even though * * * due to defective draftsmanship or to inadvertance, * * * men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law." (318 U.S. 245).

The principles have long since been the law of the land.

U. S. v. Eaton, 144 U.S. 677, 12 S.Ct. 764, 36 L.Ed. 591;

Todd v. U. S., 158 U.S. 278, 15 S.Ct. 889, 39 L.Ed. 982;

U. S. v. Wiltberger, 5 Wheat. 76, 18 S.Ct. 76, 5 L.Ed. 37;

U. S. v. Harris, 177 U.S. 305, 20 S.Ct. 609, 44 L.Ed. 780;

U. S. v. United Verde Copper Co., 196 U.S. 207, 25 S.Ct. 222, 49 L.Ed. 449;

U. S. v. George, 228 U.S. 14, 33 S.Ct. 412, 57 L.Ed. 712;

Lynch v. Tilden Produce Company, 265 U.S. 315, 44 S.Ct. 488, 68 L.Ed. 1034;

U. S. v. Resnick, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed. 127;

M. Kraus & Bros. v. U. S., 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894.

By the regulation the Commissioner has not in fact prescribed that a wholesale liquor dealer must make an entry of "the name and address of the person or persons to whom distilled spirits were sent." Furthermore, under statute, on the authorities cited, he is without power to do so, so as to thereby establish as an offense the false making of such an entry, for the regulations of the Commissioner "cannot enlarge the meaning of a statute enacted by Congress," nor "add to the terms of an Act of Congress and make conduct criminal which such laws leave untouched." *U. S. v. Standard Brewery,* 251 U.S. 210, 220, 40 S.Ct. 139, 141, 64 L.Ed. 229, 235.

(d) That portion of Title 26 U.S.C.A. Section 2857 upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

(Specifications of Error I, II, III, IV, V)

As shown the statute does not require that a wholesaler keep a record or make an entry of the "name and

address of the person or persons to whom distilled spirits were sent." In this regard the contention of the indictment is baldly and simply this: The statute by specifying as an offense the case where a wholesaler "makes any false entry * * * in * * * a record of distilled spirits received and disposed of by him," thereby defines as an offense the case where a wholesaler makes any false entry in a record of the name and address of the person or persons to whom distilled spirits were sent, because the words "a record of distilled spirits received and disposed of" includes (as the indictment puts it "among other things") "the name and address of the person or persons to whom distilled spirits were sent."

The basis of such a contention necessarily is: the words "a record of distilled spirits received and disposed of" do not define the contents of such "a record"; the words "distilled spirits received and disposed of" are not a definite limitation upon the term "a record"; and the content of the "record" is not what the statute specified it to be, but is whatever administrators, juries and courts may from time to time guess it ought contain. Once we cast off the plain restriction of the phrase "distilled spirits received and disposed of," the term "a record" is then adrift in a sea of uncertainty and vagueness.

Once the principle contended for by the indictment is accepted, then it follows that a Commissioner may require that the "record" include the customer's description, his fingerprints, his financial statement, and so *ad infinitum,* for such matters do not differ in principle or logic with "the name and address of the person or persons to whom distilled spirits were sent." Accordingly, then, a whole-

saler who fails to submit such data or who "makes a false entry" of such data in the "record of distilled spirits received and disposed of" has thereby committed an offense.

Under the construction of the statute contended for by the indictment, the test of criminality would not be dependent upon a fixed objective standard set out in the statute, but rather would depend upon the subjective and shifting criteria of administrative and prosecuting officials.

If the statute is susceptible of such a construction, then the statute is unconstitutional and void because it is vague and uncertain and indefinite and sets up no immutable standard of guilt. It fails to have the definiteness and certainty essential to a valid penal statute.

U. S. v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516;

Connally, Commissioner, et al. v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

(e) That portion of the regulations of the Commissioner, Sections 194.75 to 194.81 inclusive of Title 26 Code of Federal Regulations, upon which the counts of the indictment are founded is unconstitutional and lacking in due process in that it sets up no ascertainable and immutable standard of guilt.

(Specifications of Error I, II, III, IV, V.)

As shown the statute does not require that a wholesale liquor dealer keep a record or make an entry of the "name and address of the person or persons to whom distilled spirits were sent"; nor do the regulations specify or prescribe it. The false making of such an entry is not an offense.

In this regard the regulations merely state: "daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with instructions printed thereon." On its face the regulation provides no fixed objective standard ascertainable from the regulation, but rather makes unspecified headings of an unprescribed form and unspecified "instructions printed thereon" the basis for the offense of falsely making an entry of the name and address of the person or persons to whom distilled spirits were sent. The regulation is not only vague and uncertain, but it contains no immutable standard at all.

Nowhere in the statute or regulations can a user find what is to be contained in Form 52-B, even though by Section 194.81 of the regulations a user is to provide Form 52-B at his own expense.

Nowhere in the statute or regulations can one look to see whether "Charles R. Hadley Co., Pathfinders," the printer of Form 52-B (109), had in fact accurately reproduced Form 52-B and the "headings" thereon "in the form prescribed by the Commissioner." It will take a better pathfinder than counsel for appellants to locate in the statute or regulations any such prescription.

Under the regulation the "headings" and "instructions" could be changed, altered or enlarged a hundred times by a dozen departmental employees, and one would read the statute and the regulation in vain to ascertain what the new requirements are, what entries one must make, and what acts are proscribed.

Manifestly the regulation is void for uncertainty.

U. S. v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516;

Connally, Commissioner, et al. v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.

CONCLUSION

In determining whether or not an indictment states a public offense "doubt must be resolved in favor of the accused." *Williamson v. U. S.,* supra, 28 S.Ct. 163, 165. "In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the accused." *Harrison v. Vose,* supra, 9 Howard, 372, 378.

For the reasons, and upon the authorities hereinbefore cited, the judgments of conviction as to each of the appellants should be reversed and the indictment dismissed.

Respectfully submitted,

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Fred A. Ironside, Jr.,
Attorney for Appellants, James W. Hensley, United Sales Company, a corporation, and United Distributors, Inc., a corporation.

(Appendices follow)

Appendix A

THE PRESENT STATUTE

Title 26, Section 2857, U.S.C.

"2857. Books of rectifiers and wholesale dealers.

"(a) Requirements. Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided,* That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

"The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

"Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records,

or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

"Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal."

Appendix B

THE STATUTE PRIOR TO AMENDMENT IN 1936

R. S. Sec. 3318, as amended, as in force prior to 1936 Amendment, United States Code, 1934 Edition, Sections 1208 and 1209, Title 26.

"1208. Books of rectifiers and wholesale dealers. Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alter the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified, or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like manner in said book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and fractions of a gallon at proof, and, if in the original package in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises

of such rectifier or wholesale dealer for inspection, and any revenue officer or internal revenue agent may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor dealer for a period not less than two years; and during such time it shall be produced by him to every revenue officer or internal revenue agent demanding it. And whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book, or to make entries therein as aforesaid, or cancels, alters, obliterates, or destroys any part of such book, or any entry therein, or makes any false entry therein, or hinders or obstructs any revenue officer or internal revenue agent from examining such book, or making any entry therein, or taking any abstract therefrom; or whenever such book is not preserved or is not produced by any rectifier or wholesale liquor dealer as hereinbefore directed, he shall pay a penalty of $100 and shall on conviction be fined not less than $100 nor more than $5,000, and imprisoned not less than three months nor more than three years (R. S. Sec. 3152; R. S. 3318; Feb. 27, 1877, c. 69, 19 Stat. 248; Mar. 1, 1879, c. 125, Sec. 2, 20 Stat. 329).

"1209. Monthly transcripts of books of rectifiers and wholesale dealers. Every person required to keep the books prescribed by section 1208 shall, on or before the 10th day of each month, make a full and complete transcript of all entries made in such book during the month preceding, and, after verifying the same by oath, shall forward the same to the collector of the district in which he resides. Any failure by reason of refusal or neglect to make said transcripts shall subject the person so offending to a fine of $100 for each neglect or refusal (R. S. Sec. 3318; Mar. 1, 1879, c. 125, Sec. 5, 20 Stat. 339)."

Appendix C

THE STATUTE AS AMENDED IN 1936

Act of June 26, 1936, Chapter 830, Title IV, Section 411, 49 Stat. 1962-1963.

"Sec. 411. Section 3318 of the Revised Statutes, as amended (U.S.C., 1934 ed., title 26, secs. 1208 and 1209), is further amended to read as follows:

'Sec. 3318. Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided,* That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

'The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

'Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, or to make entries therein, or cancels, alters, or obliterates any entry

therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this Act or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

'Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal.' ''

Appendix D

THE ORIGINAL STATUTE

Act of July 20, 1868, Chapter 186, Sec. 45, 15 Stat. 143.

"Sec. 45. *And be it further enacted,* That every rectifier, wholesale liquor dealer, and compounder of liquors shall provide himself with a book, to be prepared and kept in such form as shall be prescribed by the commissioner of internal revenue, and shall, on the same day on which he receives any spirits, and before he shall draw off any part thereof, or add water or anything thereto, or in any respect alter the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified, or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon; and every such rectifier, compounder, and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same shall be removed from his premises, enter, in like manner, in the said book, the day when, and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and the kind or quality of such spirits, and also the number of gallons and fractions of a gallon at proof; and, if in the original packages in which they were received, he shall enter the name of the distiller and the serial number of the package. And every such book shall be at all times kept in some public or open place on the premises of such rectifier, wholesale dealer,

or compounder of liquors, respectively, for inspection; and any revenue officer may make an examination of such book and take an abstract therefrom; and every such book, when it has been filled up as aforesaid, shall be preserved by such rectifier, wholesale liquor dealer, or compounder of liquors, for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding the same; and if any rectifier, wholesale dealer, or compounder of liquors shall refuse or neglect to provide such book or to make entries therein as aforesaid, or shall cancel, alter, obliterate, or destroy any part of such book, or any entry therein, or make any false entry therein, or hinder or obstruct any revenue officer from examining such book or making any entry therein, or taking any abstract therefrom; or if such book shall not be preserved or not produced by any rectifier, or wholesale dealer, or compounder, as hereinbefore directed, he shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

Appendix E

THE REGULATIONS

Section 194.75 to 194.81 inclusive, Title 26 Code of Federal Regulations; Supplement 1940, Titles 21-29, Book 2, Code of Federal Regulations of the United States of America, pages 3001-3003.

"194.75 *Records to be kept by wholesale liquor dealers.* (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, 'Wholesale Liquor Dealer's Record,' and render monthly transcripts, Forms 52A and 52B, 'Wholesale Liquor Dealer's Monthly Report,' and Form 338, 'Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B).'

"(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur: *Provided,* That if the keeping of such separate record is approved by the district supervisor, a wholesale liquor dealer may keep a separate record, such as invoices, of the removal of distilled spirits, showing the removal data required to be entered on Record 52, but the daily entries of the removal of distilled spirits from his premises shall be made on Record 52 not later than the close of business of the following business day.

"(c) A dealer who sells wines or malt liquors, or both, in wholesale quantities, and who sells distilled spirits in retail quantities, is not required to keep Record 52 or to

file monthly transcripts, Forms 52A and 52B, and report, Form 338.

"(d) Wholesale liquor dealers who sell wines and malt liquors only, and wholesale malt liquor dealers are not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338† (I.R.C. 2857, 2858, 53 Stat. 327, 328; 26 U.S.C., Sup., 2857, 2858).

"194.76. *Separate record of serial numbers of cases.* Serial numbers of cases of distilled spirits disposed of need not be entered on Record 52, provided the proprietor keeps at his place of business a separate record, showing such serial numbers, with necessary identifying data, including the date of removal and the name and address of the consignee, provided the keeping of such record is approved by the district supervisor. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such manner that the required information may be ascertained readily therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by revenue officers. If a record in book form is kept, entries shall be made on such separate approved record not later than the close of business of the day on which the transactions occur. The dealer shall note in Record 52, in the column for reporting serial numbers of spirits disposed of, 'Serial numbers shown on commercial records per authority, dated .....† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857).

"194.77. *Entry of miscellaneous items.* Wholesale liquor dealers may enter on Record 52 as one item the total

quantity of different kinds of spirits made up from broken cases sold to the same person on the same day, provided such total quantity is not in excess of 10 gallons. The entry of such items shall be stated as 'Miscellaneous' or 'Misc.' and shall show the date, the name and address of the person to whom sold, and the quantity. The total quantity of such miscellaneous spirits so disposed of during the month shall be reported in the monthly summary, Form 338, as 'Miscellaneous': *Provided,* That the wholesale liquor dealer determines by actual inventory the quantity of each kind of spirits remaining on hand at the end of the month.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

"194.78. *Place where Record 52 shall be kept.* (a) Except as provided in paragraph (b), the wholesale liquor dealer shall keep Record 52 at the place of business covered by his wholesale liquor dealer special tax stamp, if spirits are received and sent out from such premises.

"(b) If the place of business covered by the wholesale liquor dealer special tax stamp is not the same premises where the spirits are received and sent out, the wholesale liquor dealer shall keep his Record 52 at the latter place and render transcripts from such place on Forms 52A and 52B and summary report on Form 338: *Provided,* That, if approved by the district supervisor, a wholesale liquor dealer may keep his Record 52 at the place of business covered by the special tax stamp and render transcripts on Forms 52A and 52B and summary report on Form 338 from such place. If, however, the place of business covered by the special tax stamp is not in the same supervisory district as the place where the spirits are received and send out, Record 52 must be kept at the latter place and transcripts on Forms 52A and 52B and

summary report on Form 338 rendered to the district supervisor of that district.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857).

"194.79. *Wholesale liquor dealer maintaining a retail department.* (a) A wholesale liquor dealer who sells distilled spirits at wholesale and at the same premises sells distilled spirits at retail in his capacity as a retail dealer in liquors, and who maintains a separate retail department, shall keep Record 52 at his wholesale department of all distilled spirits there received and disposed of. Distilled spirits transferred from the wholesale department to the retail department shall be reported on Record 52, part 2, as 'Transferred to Retail Department.' Where it is necessary in the filling of a wholesale order to take liquor out of the retail department, the quantity removed from the retail department must be shown on Record 52, part 1, as 'Transferred from Retail Department,' and the entire sale shown in Record 52, part 2, as a disposal.

"(b) The retail department need not be maintained in a separate room or be partitioned off from the wholesale department, but the retail department must in fact be separate from the wholesale department.

"(c) Where a wholesale liquor dealer sells at both wholesale and retail, and does not maintain a separate retail department, all distilled spirits received and disposed of shall be entered on Record 52.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

"194.80. *Monthly reports.* (a) A wholesale liquor dealer shall file transcripts of Record 52 on Forms 52A and 52B, and a summary report on Form 338, with the district supervisor, on or before the tenth day of the succeeding month. Record 52 shall be preserved for a period of 4 years and, during such period shall be available

during business hours for inspection and the taking of abstracts therefrom by any internal revenue officer.

"(b) If there be no receipts and disposals of distilled spirits by a wholesale liquor dealer, during any month, it will be necessary to forward monthly summary on Form 338 only to the district supervisor, showing the quantity on hand the first day of the month and the quantity on hand the last day of the month and marked 'No transactions during month.'

"When a wholesale liquor dealer discontinues business as such, he shall render monthly reports, Forms 52A and 52B and the summary report on Form 338, covering transactions for the month in which business is discontinued, and mark such reports 'Final.' Record 52 shall be preserved by the dealer for a period of 4 years thereafter.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

"194.81. *Forms to be provided by users at own expense.* Record 52, Forms 52A, 52B, and 338 will be provided by users at their own expense, but must be in the form prescribed by the Commissioner: *Provided,* That, with the approval of the Commissioner, they may be modified to adapt their use to tabulating or other mechanical equipment: *Provided further,* That where the form is printed in book form, including loose-leaf books, the instructions may be printed on the cover or the fly leaf of the book instead of on the individual form.† (I.R.C. 2857, 53 Stat. 327; 26 U.S.C., Sup., 2857.)

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†"For source citation, see note to Sec. 194.1." The note to Section 194.1 is as follows: "The source of Secs. 194.1 to 194.96, inclusive, is Regulation 20, Secretary of the Treasury, June 6, 1940, effective on and after the sixtieth day; 5 FR 2170." (Page 2986, Supplement 1940, Titles 21-29, Book 2, Code of Federal Regulations of the United States of America.)

No. 11922

United States
Court of Appeals
for the Ninth Circuit

CLEM J. CUSACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Central Division

No. 19898—(49 USC 311(a))

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLEM J. CUSACK,

Defendant.

INFORMATION

The United States Attorney charges: [2]

COUNT 1.

That on, to wit, June 13, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement with one Mrs. J. H. Oliver, for compensation, to wit, $45.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, 2,000 pounds household

goods, by motor vehicle on public highways from said Los Angeles, California, to San Antonio, Texas, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [3]

COUNT II.

That on, to wit, February 26, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Mrs. Ellen M. Hepner, for compensation, to wit, $80.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Pottsville, Pennsylvania, to Los Angeles, California, for compensation, then and there without holding a broker's license issued by the Interstate Com-

merce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [4]

COUNT III.

That on, to wit, September 4, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Louis Nault, for compensation, to wit, $60.25, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways, from Fremont, Nebraska, to Long Beach, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code.

COUNT IV.

That on, to wit, March 10, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Marvin Young, for compensation, to wit, $50., to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Cedar Rapids, Iowa, to Gardena, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [6]

COUNT V.

That on, to wit, July 12, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant,

doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Wm. H. Koch, for compensation, to wit, $85.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Covington, Kentucky, to Los Angeles, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [7]

COUNT VI.

That on, to wit, May 21, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in in-

terstate commerce on public highways for compensation ,and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Ethel Holman, for compensation, to wit, $45.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Chicago, Illinois, to Long Beach, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [8]

COUNT VII

That on, to wit, October 8, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully and knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for

such transportation, and make a contract, agreement and arrangement, with one Mrs. Francis Dambach, for compensation, to wit, $20.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from Charleroi, Pennsylvania, to Los Angeles, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [9]

COUNT VIII.

That on, to wit, February 21, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Mrs. Edmond O'Neil, for compensation, to wit, $50.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household

goods, by motor vehicle on public highways from Hibbing, Minnesota, to Long Beach, California, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code. [10]

COUNT IX.

That on, to wit, February 26, 1947, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements, and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement, with one Marie Germann, for compensation, to wit, $50.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from said Long Beach, California, to Seattle, Washington, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions,

all in violation of Title 49, Section 311(a), U. S. Code. [11]

COUNT X.

That on, to wit, June 22, 1946, at Los Angeles, California, in the State and Southern District of California, Central Division, and within the jurisdiction of this Court, Clem J. Cusack, defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, agreements and arrangements to provide, procure, furnish and arrange for such transportation, and hold himself out as one who sells, provides, procures, contracts and arranges for such transportation, and make a contract, agreement and arrangement with one Paul Reese, for compensation, to wit, $50.00, to provide, procure, furnish and arrange for transportation of certain property, to wit, household goods, by motor vehicle on public highways from said Long Beach, California, to Belgrade, Montana, for compensation, then and there without holding a broker's license issued by the Interstate Commerce Commission authorizing him to engage in such transactions, all in violation of Title 49, Section 311(a), U. S. Code.

JAMES M. CARTER,
United States Attorney.
/s/ RAY H. KINNISON,
Assistant U. S. Attorney.

[Endorsed]: Filed March 5, 1948. [12]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 15th day of March, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

For arraignment and plea; H. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; defendant present on bond, his attorney Mel Rodney, Esq., is not present; defendant states his true name is as set forth in Information, which is read, and defendant pleads not guilty to all ten counts.

Court orders cause continued to March 16, 1948, 10 a.m., for setting. [13]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 20th day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For jury trial; H. E. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; Stuard Wegener, Esq., appearing as counsel for defendant, who is present; Attorney Wegener moves to be admitted to practice for this case only and it is so ordered. Court orders that a jury be impaneled for this trial and the clerk draws names of twelve jurors who take places in jury box. Court examines said jurors and explains the nature of the charges and passes the jurors in the box for cause.

Kiyoshi Sugimoto is excused by plaintiff and clerk draws name of Chas. J. Clancy, who is examined and passed for cause. Both sides waive further challenges, and the jurors now in the box are accepted and sworn as the jury for this trial, viz.: The Jury:

Chas. J. Clancy, Lila L. Nunnally, Margaret H. Lambert, Allan C. Zweng, Pauline V. Farmer, Florence C. Babb, Earl Allman, Maud B. Rosenberger, Louis F. Valdes, Mabel S. Quarry, Floria Leeds, Jeannette H. Zell.

Court orders that the petit jurors present who were not impaneled for this trial are excused until notified.

Counsel waive further reading of the Information. Attorney Champlin makes opening statement and Attorney Wegener defers opening statement.

At 11 a.m. Court admonishes the jury and de-

clares a recess. At 11:35 a.m. court reconvenes herein and all being present as before, including the defendant and the jury, and counsel so stipulating.

Marvin Young is called, sworn, and testifies for Gov't. Gov't Ex. 1 is marked for Ident. and admitted in evidence. [14]

Ethel Holman is called, sworn, and testifies for Gov't. Gov't Ex. 2 is marked for ident. and admitted in evidence.

Frances Dambach is called, sworn, and testifies for Gov't. Gov't Ex. 3 is marked for ident. and admitted in evidence.

Court admonishes the jury and declares a recess at 12:20 p.m. to 2 p.m.

At 2:20 p.m. court reconvenes herein and all being present as before, including the jury, defendant, and counsel; Owen McGuigan and Louis Nault, respectively, are called, sworn, and testify for Gov't.

Owen McGuigan testifies further. Gov't Ex. 4, 5, and 6 are marked for ident. and admitted in evidence.

Mrs. J. A. (Irene) Oliver is called, sworn, and testifies for Gov't. Gov't Ex. 7 and 8 are marked for ident. and admitted in evidence.

It is stipulated that the jury is admonished and Court declares a recess at 3:35 p.m. At 4 p.m. court reconvenes herein and all being present as before, including the jury, defendant, and counsel.

Marie Germann is called, sworn, and testifies for Gov't. Gov't Ex. 9 and 10 are marked for ident. and admitted in evidence.

Mrs. Marie Koch is called, sworn, and testifies

for Gov't. Gov't Ex. 11 is marked for ident. and admitted in evidence.

Bertha Johnson and Chas. Lester, respectively, are called, sworn, testify for Gov't. Gov't Ex. 12 is admitted in evidence and Gov't Ex. 13 is marked for ident. and admitted in evidence.

Gov't rests. At 5:05 p.m. the Court admonishes the jury not to discuss this cause and excuses the jury to 10 a.m., April 21, 1948, and the jury leaves the court room. In the absence of the jury the Court and counsel discuss presentation of proposed instructions.

At 5:10 p.m. Court declares a recess in this trial until 10 a.m., April 21, 1948. [15]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 21st day of April in the year of our Lord one thousand nine hundred and forty eight.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For jury trial; H. E. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; Stuard Wegener, Esq., appearing as counsel for defendant, who is present; and the jury being present; coun-

sel stipulate that the jury has been admonished and at 10:48 a.m. the jury retires from the court room. In the absence of the jury Attorney Wegener moves to acquit on Count 2. Attorney Champlin states the Gov't does not oppose, and Court orders said motion granted. Attorney Wegener moves for acquittal on all other counts and argues in support. Court denies said motion. At 11:10 a.m. the jury returns into court, and defendant and counsel being present; Clem J. Cusack is called, sworn, and testifies in his own behalf. Deft's Ex. A and Plf's Ex. 13 and 14, respectively, are marked for ident. and admitted in evidence.

At 12:15 p.m. the jury is admonished and excused to 1:30 p.m. and the jury withdraws from the court room. In the absence of the jury, the Court and counsel discuss instructions to be given. At 12:30 p.m. court recesses to 1:30 p.m.

At 1:40 p.m. court reconvenes herein, and the jury, defendant and counsel being present, Attorneys Champlin and Wegener argue to the jury. The Court instructs the jury. Attorney Champlin asks for clarification of one instruction and counsel approach the bench and out of hearing of the jury discuss the matter. The Court then gives additional instructions to the jury. Counsel state no objections to instructions as modified.

G. Fuller is sworn as bailiff. At 3:12 p.m. jury retires to [16] deliberate. Instructions given and instructions refused by the Court are filed.

Court recesses until called. At 3:32 p.m. the jury request and on order of Court are given the Information, exhibits, and instructions.

At 4 p.m. court reconvenes herein, and the jury, defendant, and counsel being present, verdict is presented, read, and ordered filed and entered in minutes, to wit:

* * * *

Court orders cause continued to April 22, 1948, 10 a.m., for sentence, and that the cause be not referred to Prob. Officer; defendant to remain on bond. [17]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Clem J. Cusack,

Guilty as charged in Count 1 of the Information;
Guilty as charged in Count 3 of the Information;
Guilty as charged in Count 4 of the Information;
Guilty as charged in Count 5 of the Information;
Guilty as charged in Count 6 of the Information;
Guilty as charged in Count 7 of the Information;
Guilty as charged in Count 8 of the Information;
Guilty as charged in Count 9 of the Information;
Guilty as charged in Count 10 of the Information;

Dated: April 21, 1948.

/s/ MABEL S. QUARRY,
Foreman of the Jury.

[Endorsed]: Filed April 21, 1948. [18]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 22nd day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For sentence on counts 1 and 3 to 15 incl.; H. E. Champlin, Ass't U. S. Att'y, appearing as counsel for Gov't; Stuard Wegener, Esq., appearing as counsel for defendant, who is present on bond;

Attorney Wegener makes a statement and moves to set aside verdict and to arrest the judgment, and argues in support. The Court makes a statement and orders both motions denied. Attorney Champlin makes a statement.

The Court pronounces judgment as follows: * * *

Court orders execution of judgment stayed until 5 p.m., May 24, 1948, and bond on appeal fixed at $2,000.

Pre-sentence report is filed. Court orders defendant have until 5 p.m., April 23, 1948, to file consent of surety that bond remain in effect during stay of execution unless appeal bond is filed in the amount of $2,000. [19]

District Court of the United States, for the Southern District of California, Central Division

No. 19,898—Criminal
Information—10 Counts 49 USC 311(a)

UNITED STATES OF AMERICA,

vs.

CLEM J. CUSACK.

JUDGMENT AND COMMITMENT

On this 22nd day of April, 1948, came the attorney for the government and the defendant appeared in person and by counsel, Stuard Wegener, Esq.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of Count 1, and 3-10 inc.; (Count 1) that on June 13, 1947, at Los Angeles, Calif., defendant, doing business as Lincoln Transfer & Storage Co., unlawfully did knowingly and wilfully for compensation sell and offer for sale transportation subject to the Interstate Commerce Act, to wit, transportation of property by motor vehicle in interstate commerce on public highways for compensation, and make contracts, etc., for transportation, without holding a broker's license issued by the I.C.C.; (other counts charged similar violations) as charged in said information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant pay unto the United States of America a fine of $100.00 on Count 1, a fine of $100.00 on Count 3, a fine of $100.00 on Count 4, a fine of $100.00 on Count 5, a fine of $100.00 on Count 6, a fine of $100.00 on Count 7, a fine of $100.00 on Count 8, a fine of $100.00 on Count 9, and a fine of $100.00 on Count 10; (making a total of $900.00 in fines); and committed to an institution of the jail type until said fines are paid or he is discharged therefrom by due process of law.

It Is Ordered that execution on said fines is stayed until 5 p.m., May 24, 1948.

Note: Count 2 was dismissed by order of Court on April 21, 1948.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant, if said fines are not paid.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed April 22, 1948. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offense: Nine (9) informations charging violations of 49 USC 311(a).

Concise statement of judgment or order, giving date, and any sentence: Judgment dated April 22, 1948, imposing fine of $100.00 on each of the nine in-

formations convicted, totalling the fines to the sum of $900.00, not commited on the fine.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-entitled judgment.

Dated: May 3, 1948.

/s/ STUARD WEGENER,
Appellant's Attorney.

[Endorsed]: Filed May 3, 1948. [21]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO DOCKET THE RECORD ON APPEAL

Upon the reading of the affidavit of Stuard Wegener and good cause appearing therefor, It Is Hereby Ordered, pursuant to Rule 39 (c), the New Federal Rules of Criminal Procedure, that appellant may have to and including July 12, 1948, within which to docket the record on appeal.

Dated: June 11th, 1948.

/s/ PAUL J. McCORMICK,
Judge, United States District Court.

AFFIDAVIT OF STUARD WEGENER

State of California,
County of Los Angeles—ss.

Stuard Wegener, being first duly sworn, deposes and says that: Time for docketing record on appeal is June 12, 1948.

He is one of the attorneys for the defendant and appellant in the above entitled action. He has requested the court reporter, Henry A. Dewing, that he prepare the reporter's transcript in the above case. During the time that said reporter was to prepare the transcript, he took sick and informs affiant that he has been unable to prepare the reporter's transcript but that he believes that he will be able to have it completed within ten days to two weeks.

Affiant has paid said court reporter the necessary deposit for the preparation of said transcript.

Accordingly, affiant requests, pursuant to Rule 39 (c), the [23] New Federal Rules of Criminal Procedure, that time within which appellant may have to docket the record on appeal be extended to and including July 12, 1948.

/s/ STUARD WEGENER,

Subscribed and sworn to before me this 11th day of June, 1948.

/s/ MIWAKO YANAMOTO,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 11, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of

the United States Circuit Court of Appeals, for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the entire record, with the stipulation the original exhibits be forwarded and not transcribed.

Dated this 14th day of June, 1948.

/s/ STUARD WEGENER,
Attorney for Defendant.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed June 15, 1948. [26]

[Title of District Court and Cause.]

AFFIDAVIT AND ORDER FOR EXTENDING TIME FOR FILING RECORD ON APPEAL IN CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

State of California,
County of Los Angeles—ss.

George A. Willson, being by me first duy sworn, deposes and says:

That he is one of the attorneys of record for the defendant, Clem J. Cusack, in the above entitled action; that the time for filing the record on appeal in the Circuit Court of Appeals for the Ninth Circuit will expire today, July 12, 1948, and that the transcript of the record in case number 19898, criminal, has not been produced as of this date because the reporter Mr. Henry Dewing has been ill, and the defendant Clem J. Cusack and his attorney,

your affiant, did not learn of said illness until July 12, 1948, therefore, the defendant by and through his attorney George A. Willson, affiant herein, respectfully requests this court to enlarge the time to file the transcript of record in the above entitled matter.

/s/ GEORGE A. WILLSON [28]

Subscribed and sworn to before me this 12th day of July, 1948.

(Seal) EDMUND L. SMITH,
Clerk, U. S. District Court,
Southern District of Calif.

By /s/ THEODORE HOCKE,
Deputy.

ORDER

The affidavit of George A. Willson, attorney of record for Clem J. Cusack, defendant in action number 19898, Criminal, in the above entitled court having been filed, and good cause shown therein for the enlargement of the time in which to file the transcript of record in the above entitled matter on appeal in the Circuit Court of Appeals for the Ninth Circuit is extended from July 12, 1948. to July 31, 1948.

It Is So Ordered: This 12th day of July, 1948.

/s/ PAUL J. McCORMICK,
Judge, United States District Court.

[Endorsed]: Filed July 12, 1948. [29]

[Title of District Court and Cause.]

AFFIDAVIT AND ORDER FOR EXTENDING TIME FOR FILING RECORD ON APPEAL IN CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

State of California,
County of Los Angeles—ss.

George A. Willson, being by me first duly sworn, deposes and says:

That he is one of the attorneys of record for the defendant, Clem J. Cusack, in the above entitled action; that the time for filing the record on appeal in the Circuit Court of Appeals for the Ninth Circuit was continued until July 31, 1948, and that the transcript of the record in case number 19898, criminal, has not been produced as of this date because the reporter Mr. Henry Dewing has been ill and at this time continues to be ill, therefore, the defendant by and through his attorney George A. Willson, affiant herein, respectfully requests this court to grant another extension of time in which to file the transcript of record in the above entitled matter.

/s/ GEORGE A. WILLSON. [30]

Subscribed and sworn to before me this 29th day of July, 1948.

(Seal) /s/ HARRY L. RICHARDSON,
Notary Public in and for the County of Los Angeles, State of California.

ORDER

The affidavit of George A. Willson, attorney of record of Clem J. Cusack, defendant in action number 19898, Criminal, in the above entitled court having been filed, and good cause shown therein for the enlargement of the time in which to file the transcript of record in the above entitled matter on appeal in the Circuit Court of Appeal for the Ninth Circuit is extended until September 30, 1948.

It Is So Ordered: This 29th day of July, 1948.

/s/ J. F. T. O'CONNOR,
Judge, United States District Court.

[Endorsed]: Filed July 29, 1948. [31]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR FILING ORIGINAL EXHIBITS

It is stipulated by the parties through their attorneys in the above entitled matter that the original exhibits may be forwarded on appeal in lieu of certified copies of the evidence being made that an order may be so made.

Dated this twenty-seventh day of September, 1948.

GEORGE A. WILLSON,
STUARD WEGENER,
By /s/ GEORGE A. WILLSON,
Attorneys for Defendant.
/s/ JAMES M. CARTER,
U. S. Attorney,
/s/ ERNEST A. TOBIN,
Asst. U. S. Attorney,
Attorneys for United States of America, Plaintiff.

ORDER

The stipulation of the parties by and through their attorneys of record in Action 19898-Criminal in the above entitled court having been filed, it is hereby ordered that the original exhibits of the evidence in the above entitled matter may be forwarded on appeal in lieu of certified copies.

It Is So Ordered: This 27th day of September, 1948.

/s/ LEON R. YANKWICH,
Judge, United States District Court.

[Endorsed]: Filed Sept. 27, 1948. [33]

In the District Court of the United States, Southern District of California, Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain full, true and correct copies of Information; Minute Orders Entered March 15, April 20 and 21, 1948; Verdict; Minute Order Entered April 22, 1948; Judgment and Commitment; Notice of Appeal; Designation of Record on Appeal; Three Affidavits and Orders Extending Time to File Record on Appeal and Stipulation and Order re Original Exhibits which, together with copy of reporter's transcript of proceedings on April 20 and 21, 1948 and original plaintiff's Exhibits Nos. 1 to 14, in-

clusive, and original defendant's Exhibits A and B, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $8.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of September, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

In the District Court of the United States for the Southern District of California, **Central Division.**

Honorable Leon R. Yankwich, Judge Presiding.

No. 19,898

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLEM C. CUSACK,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
April 20, 1948

Appearances: For the Plaintiff: James M. Carter, Esq., United States Attorney; Herschel E. Champlin, Esq., Assistant United States Attorney. For the Defendant: Stuard Wegener, Esq. [1 *]

Los Angeles, California, Tuesday, April 20, 1948, 10 a.m.

The Court: Do you desire to make an opening statement?

Mr. Champlin: Yes, your Honor, the Government desires to make a short opening statement.

The Court: Ladies and gentlemen of the jury, for the information of those who have not sat on cases before, an opening statement, whether made in a civil or a criminal case, or whether made in a State or Federal Court, is always the same; it is

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

not proof of anything. Counsel is merely stating to you what they expect to prove. The proof will come to you through witnesses and documentary evidence to be presented in this court. They are merely telling you what they expect to prove. Some of the things they say they might prove them might not be able to prove, because the Court might exclude testimony relating to them. With that understanding Mr. Champlin will make the opening statement for the Government.

Mr. Camplin: Ladies and gentlemen of the jury, as the Court instructed you, this charge is is in ten counts of the information, for arranging for and making contracts for interstate transportation, the defendant not having a broker's license, according to the Interstate Commerce Act.

The Government expects to prove that the defendant does not have such a license. It will prove by its witnesses that the defendant did make arrangements, and he did make contracts [3] for compensation, and that he procured business for the transportation of goods. The Government will ask the Court for an instruction that interstate transportation simply means from one State to another.

The Government expects to show that contracts were entered into. They were arranged for, and compensation was paid to the defendant. He had no authority from the Interstate Commerce Commission to act as a broker. We expect to prove that he was not a broker, or a person defined as a broker, according to the Court's instruction.

The next thing which may come to your mind is why a permit is necessary, but that is a matter

of law. It is in the Interstate Commerce Act.

Briefly, it requires such person, carrying on this type of business, should have secured a bond, if the permit is issued, so that he will be financially responsible on such contracts and engagements which he makes, in seeing that they are carried out, in the transportation of goods by motor carrier. The facts are very simple. You have all seen the huge vans and motor trucks moving household goods. Each of the ten counts of the information are almost identical, except they deal with different members of the public who were contacted by the defendant, either by advertisement or over the telephone, or otherwise, in his business.

That is the sum and substance of it, and at the close of [4] all the evidence the Government will ask you to bring back a verdict of guilty as to all of the ten counts. That is all the statement the Government desires to make at the present time.

The Court: Do you desire to make a statement at the present time? That is your privilege, but if you want to wait until the Government has concluded and make it at that time you may.

Mr. Wegener: I will wait until the Government concludes.

The Court: So as not to break the continuity, we will declare a short recess. The Court admonishes the jury not to converse among themselves nor with anyone else, on any subject connected with the trial, and not to form or express an opinion thereon until the case is finally submitted to you.

(Short recess.)

The Court: Let the record show that the jury is

in the box, and the defendant in Court with his counsel.

Call your first witness.

MARVIN YOUNG,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Marvin Young. [5]

Direct Examination

By Mr. Champlin:

Q. What is your occupation, Mr. Young?

A. Radio executive.

Q. Whereabouts do you live?

A. Los Angeles; at the present time 4432 Farmdale Avenue, North Hollywood.

The Court: I think it would be an appropriate idea, if, as a witness is called, you will designate the count, Mr. Champlin. This is Count IV?

Mr. Champlin: Count IV.

Q. How long have you lived in Los Angeles, Mr. Young?

A. Prior to my going into the service, 20 years.

Q. I direct your attention to the date of approximately March 10, 1947. You were living in Los Angeles at that time? A. I was.

Q. Did you have occasion to see the defendant Cusack on or about that day? A. I did.

Q. How did that meeting take place, Mr. Young? How did you get together?

(Testimony of Marvin Young.)

A. Initially through an advertisement in the Los Angeles Examiner, in which he quoted rates for moving household goods from Los Angeles to various points throughout the country. [6]

Q. Did you see Mr. Cusack at his place of business or your place of business, or his home?

A. At my home, at that time.

Q. Did he call in person? A. In person.

Q. What was your conversation with him at that time? What did you say and what did he say?

A. We discussed the moving of these household goods which belonged to my mother and father-in-law, who were contemplating moving from Cedar Rapids to Los Angeles. We did not know the weight of the goods, and so forth, and he did not know, in the telephone conversation, the rate he would charge on that occasion, and his call was to discuss the final arrangement for the movement of these goods.

Q. These goods were in Cedar Rapids, Iowa?

A. Yes.

Q. Where did you desire them moved to?

A. Gardena, California.

Q. Did you enter into arrangements with Mr. Cusack to move the goods to Gardena?

A. Yes, I did.

Q. What transaction took place?

A. A form, a carbon of which I have here in my hand.

The Clerk: This is Plaintiff's Exhibit No. 1 for identification. [7]

(Testimony of Marvin Young.)

Q. This exhibit which has been marked Government's Exhibit No. 1—did Mr. Cusack, the defendant, sign it in your presence?

A. He did.

Q. Point out where his signature appears on the paper.

A. In this spot over here, and again at the bottom.

Q. What does that paper purport to be, as you understand it?

A. Arrangement to move our household goods from Cedar Rapids to Gardena, California.

Q. Was there any consideration attached for this movement, on your part? Did you pay him any money? A. I did.

Q. How much money was paid?

A. $50.00.

Mr. Champlin: At this time the Government offers in evidence Plaintiff's Exhibit No. 1 marked for identification.

The Court: It will be received.

The Clerk: Plaintiff's 1 in evidence.

Q. My Mr. Champlin: Did you see in the defendant's presence or possession any moving vans or trucks or equipment to move this furniture?

A. No.

Q. As a matter of fact, did he move it to your designated place for you? [8] A. He did not.

Q. What took place in between the time the defendant signed the paper, and you paid him $50.00? What transpired from that date until the transaction was closed?

(Testimony of Marvin Young.)

A. In substance, one of the reasons why we had signed this agreement with him was the fact that he agreed to transport these goods between certain dates. In accordance with these arrangements my mother and father-in-law in Cedar Rapids sold their place, and guaranteed possession of the place between the dates he guaranteed he would have the van.

The van was to call between March 24 and March 31. On April 1st they communicated with us, and said the van had not arrived, and I called Mr. Cusack. I tried to get in touch with him several times, which I could not do.

I then called the Interstate Commerce Commission, and explained my situation to them, and stated to them that I had relied on the fact that he was operating under their auspices, and asked them to take some action. Whereupon they called me back and said they had communicated with Mr. Cusack and he would call me.

On April 2nd he called me, and said a van would call there in Cedar Rapids, and we immediately called Cedar Rapids, and we told them that information, and suggested, to confirm this, that they get in touch with the Von der Ahe Moving Company, which Mr. Cusack stated was his carrier in St. [9] Louis, and find out from them exactly what day they would arrive.

Subsequently my brother-in-law communicated with us by means of a wire, in which he, in sub-

(Testimony of Marvin Young.)

stance stated that the St. Louis firm knew nothing of the order at all. This was after March 31st, which was the termination date Mr. Cusack gave us that the van would call at Cedar Rapids.

Immediately subsequent to that we wired back and said to find out when they could send the van. My brother-in-law called up on the phone and said that Mr. Von der Ahe of St. Louis said they did not know when the van would call for the goods, and suggested that we get another carrier, which we did, at Cedar Rapids, and that van brought the goods out.

Q. You said that Mr. Cusack represented to you that a Von der Ahe truck would pick up your goods and deliver them to you in California?

A. That was so stated over the phone.

Q. Was any restitution of the money made?

A. Subsequently a letter in my own handwriting was sent to Mr. Cusack by registered mail, requesting the money. I heard nothing from the letter. I again called the Interstate Commerce Commission, who were cooperative. They said they would get in touch with him. Subsequently he called me up and said he was making out a check, on that day, and that I should receive it by Saturday. A week or ten days went by; [10] but I did receive the $50.00 back.

Q. What company in California did Mr. Cusack represent he was working for, or doing business under what name?

A. Lincoln Van and Storage Company.

(Testimony of Marvin Young.)

Mr. Champlin: You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Mr. Young, when you called the defendant's office, was that, as you state, the result of the advertisement in the Los Angeles Examiner quoting rates between points? A. That is correct.

Q. At the time you called him did you inquire of him just how he was going to handle your shipment? A. Yes, by motor carrier.

Q. Would you try and relate, as closely as you can, the conversation, when you first called the defendant?

A. In substance, the first conversation was about the rates, and Mr. Cusack said the rates quoted in the paper were not for westbound freight, but for shipments moving from Los Angeles to the places he quoted. I then stated we had these goods in Cedar Rapids, and did he have a truck calling in that area approximately the end of March. That was the only direct reference to transportation.

Q. Did you ask him what his rates per hundred weight would be on the movement of household good between Cedar [11] Rapids and California?

A. Yes.

Q. Did you inquire of other carriers?

A. I did.

Q. Did the other carriers give approximately the same answer, or what was the conversation?

(Testimony of **Marvin Young.**)

A. Pertaining to rates?

Q. Rates, service, and promise of loading, and so forth.

A. Those questions were each asked of the other carriers, as to whether they would have a truck at Cedar Rapids approximately that date, and the cost per hundred pounds, and so forth. In substance it was the same inquiry I directed to Mr. Cusack.

Q. Were the rates per hundred weight the same?

R. No, I think Mr. Cusack quoted a rate which was slightly under the rate of the companies we called.

Q. What type of service did the rest of the companies offer?

A. They offered similar service. The major difference between that Mr. Cusack offered and the other concerns, was (a) the rate, and (b) the time when they could pick up the goods. Some stated that it would be sometime after we wanted the goods picked up, and the rates were higher.

Q. Did any other carrier make your acquainted with the fact that a bottle neck existed as to goods moving from the [12] east to the west coast at that time?

Mr. Champlin: That is objected to as immaterial.

The Court: The only question is whether the defendant had the license required. Whether the goods were actually transported, or he gave service for the money, is not material in this case.

Mr. Wegener: The Act reads, whoever, for com-

(Testimony of Marvin Young.)

pensation sells transportation, subject to the Act, without a certificate to operate as a broker, except if the man is operating or working as an employee of a company or an agent of a bona fide carrier with a license to operate between those two points, he is without the brokerage section of the Act.

The Court: You may ask him whether the inquiry was directed to figuring out whether he was employed by some concern engaged in the business.

Mr. Wegener: That is right.

The Court: The objection will be sustained. That goes to the quality of service. You may ask whether Mr. Cusack informed him whether he was acting for somebody else, or whether the named company supplied the transportation.

By Mr. Wegener: Q. Did you ask the defendant who the carrier was he was representing on this shipment of household goods between Cedar Rapids and California?

A. No, I did not.

Q. The shipment was loaded by some company on March 10, [13] 1947?

A. No, the initial agreement was signed, which was introduced a moment ago, that agreement was signed on March 10th. The pickup of the goods was to be, according to the agreement, between March 24th and March 31, which was the last week of the month.

Q. The deposit which you gave the defendant of $50.00, I believe you stated was returned to you,

(Testimony of Marvin Young.)

and you arranged with some other carrier, or some other means of getting your goods moved from Cedar Rapids, to California?

A. That is correct.

Mr. Wegener: That is all.

The Court: Any redirect?

Mr. Champlin: No.

The Court: Call your next witness.

ETHEL HOLMAN,

a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Ethel Holman.

Direct Examination

By Mr. Champlin:

Q. This inquiry relates to Count VI, ladies and gentlemen.

Mrs. Holman, where do you reside, please? [14]

A. 1818 East Third, Long Beach.

Q. Did you reside there on or about May 21, 1946? A. Yes, sir.

Q. Did you have occasion on or about that date to see the defendant, Mr. Cusack? A. Yes, sir.

Q. Where did you see him? A. At my home.

Q. How was the interview arranged with him?

A. By telephone.

Q. Did you call first?

A. Yes, sir, I called a number that was in an advertisement in the paper.

(Testimony of Ethel Holman.)

Q. Talk louder.

A. I called a telephone number that was in the paper, in the newspaper.

Q. Do you happen to recall that number?

A. No, but I believe it is on the paper that I turned over to the man that served me.

Q. To refresh your memory, would it be Drexel 2597?

A. That is the Los Angeles number. This was a Long Beach number.

Q. At the time you talked to Mr. Cusack, what was the substance of the conversation? What did you say, and what did he say? [15]

A. I had some goods in Chicago that I wanted brought to Long Beach, and he said he had service vans that would pick it up.

Q. I am afraid this gentleman can't hear over here. Repeat your answer, if you will, Mrs. Holman.

A. I called the number, and he said he had service of vans that made contact in Chicago that would pick up my goods and bring them to Long Beach. He quoted me a price, but it would be charged according to weight. I was anxious to get the goods. He promised delivery within ten days or two weeks, if I would give him a check of $50.00. Your report says $45.00, but I paid him $50,00 and he took $5.00 off for his commission which the Better Business Bureau advised me at the time to let him have, but it cost me much more than $5.00 with my telephone calls and my wires.

(Testimony of Ethel Holman.)

Q. Did he sign a paper in your presence at that time? A. Yes, sir.

The Clerk: Plaintiff's Exhibit 2 for identification.

By Mr. Champlin: Q. I will show you Government's Exhibit marked for identification No. 2, and ask you if this is the paper that the defendant Cusack signed in your presence? A. Yes, sir.

Q. Would you show where his signature appears on the paper? [16] A. Here.

Q. Whose signature is that? A. His.

Mr. Champlin: The Government offers this exhibit in evidence.

Q. What does the paper purport to be, so far as you know?

A. Well, it was a sort of, I would say, bill of lading, as to what I was to have shipped out here, and what I was to pay.

Mr. Champlin: The Government offers this in evidence as Government's Exhibit 2.

The Court: It may be received.

The Clerk: Government's Exhibit 2 in evidence.

By Mr. Champlin: Q. Mrs. Holman, were your goods moved from Chicago to Long Beach by the defendant? A. No, sir.

Q. What transpired between the time that you saw this paper signed and you paid him $50.00? What transpired, will you tell us?

A. Yes, I waited a reasonable length of time. He told me ten days or two weeks. I waited three or four weeks, and the fourth week I tried to con-

(Testimony of Ethel Holman.)

tact him with the telephone number I had, that I had taken from the newspaper, and was unable to do so. [17]

Finally I called again and told the girl in the office to have him call me, which he did not do. Then I had no other way out that I could see. I called the Better Business Bureau. I am a widow, and I can't afford to have $50.00 of mine that I don't get any service for. So I called the Better Business Bureau. They contacted Mr. Cusack, and I waited then a certain time,—I don't know how long, but I believe about two weeks. The first contact was in May. This was in July, and finally Mr. Cusack called me and told me if I would give him until the fifth of July he would have my goods picked up.

I called the Better Business Bureau back, and he said I should grant him that time, which I did. I also wired to Chicago to the place these goods was, and told them if they were not picked up on or about the fifth, to call me or wire me immediately, which they did. And it was the seventh when they called me. They said it had not been picked up; no one had called; no one had been there. So I called the Better Business Bureau and they contacted Mr. Cusack, and told Mr. Cusack to refund my money. He sent me a money order of $45.00, which they told me I should accept, and I did, but I paid him fifty.

Q. Did Mr. Cusack represent to you what company, or moving van, would move the goods?

(Testimony of Ethel Holman.)

A. The Lincoln Transfer, he said it was, in Los Angeles; he said he was the Lincoln Transfer.

Q. Did he represent that he or the Lincoln Transfer [18] Company would move your goods from Chicago? A. Yes, sir.

Q. Did you make other arrangements for another company to bring your goods out?

A. I did.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. Mrs. Holman, when you talked with the defendant, did you ask him if he was going to be the carrier and perform the service between Chicago and Los Angeles? Did you ask him any questions relating to that at all?

A. Yes, I asked him who was the Lincoln Transfer. He said he was; that he owned that.

Q. Did you ask who the carrier was he would have in operating between Chicago and Los Angeles?

A. He said he had vans he did business with. It was such a small amount that they in turn would make some arrangements between them to have it picked up there, and brought here to Long Beach.

Q. At the time you talked with the defendant, did you inquire of any other company as to the movement of moving goods between Los Angeles and California?

A. No. He was the only man that I talked to up to until I couldn't get any results from him.

(Testimony of Ethel Holman.)

So I had to call [19] Chicago, and have the people that had moved me for twenty years,—they were the people that brought the goods out.

Q. Who was the party with whom you talked or arranged to have them brought out here from Chicago?

A. Do you mean the people who finally moved me?

Q. Yes.

A. I wired DeWall's Moving Company. They had been in business for fifty years, on Western Avenue, in Chicago. They are brothers. They brought my household goods out here.

Q. Do you have a copy of the freight bill DeWall gave you when they delivered the goods out here?

A. I don't know whether it is attached to the other one.

Mr. Champlin: I object as incompetent and immaterial, if some other company did move the goods out.

Mr. Wegener: The question is not irrelevant, your Honor? I am trying to show that she contacted an agent of another carrier in Chicago, and that the agent of the other carrier did arrange to transport, through their principal, the goods out here. There are only a few companies who have a certificate to operate between two points. The DeWall Transfer, she speaks of, acted in the same capacity in Chicago as the defendant in Los Angeles.

(Testimony of Ethel Holman.)

Mr. Champlin: It is still irrelevant and immaterial.

The Court: What became ultimately of the goods is not material. That she communicated with others in connection with [20] the defendant is absolutely immaterial. If she arranged to have them transported through someone else, and those services were performed, then, of course, that is material merely on the question of whether he actually rendered services, or simply pocketed the money. That isn't even material, except to show intent to violate the law. This case is a very simple case: Was this man authorized to act as a broker? They have to show first that he made contacts. That's what this witness testified to. Then the Government will object that he did not have a license to act as a broker, but whether the goods were actually transported or not is immaterial.

Mr. Wegener: Your Honor, the acts of the agent are exceptions to the statute. The agent does not require a broker's license.

The Court: This witness testified she called up a transportation company which completed the contract, and the transportation company, so far as she knew, was not connected at all with the defendant or anyone else. In other words, as I gather that was her own idea to call up the DeWall Company. He did not tell you to call the DeWall Company?

The Witness: No.

(Testimony of Ethel Holman.)

The Court: You knew them?

The Witness: For 25 years or better.

The Court: The objection will be sustained for the [21] reason I have indicated.

Ladies and gentlemen of the jury, I want you to bear in mind that all these discussions with counsel are merely discussions on the law. I am not deciding the facts in the case. I have ruled on the admissibility of certain questions, as it is my custom, and the custom of all of us, and the courts, when they do so generally give counsel the courtesy of giving the reason, although a Judge does not have to state the reason. You are not to draw any inference from the mere fact that I have stated certain legal principles, that I am passing judgment on the facts, or any of the facts of the case. Proceed.

By Mr. Wegener: Q. Mrs. Holman, take Plaintiff's Exhibit No. 2. I would like to have you look at the document, if you please. Will you state the section relating to the amount of money which you gave the defendant; what prepayment you gave the defendant?

Will you read the part of the exhibit?

A. Do you mean received $45.00?

Q. That's right.

A. But he received $50.00. He did not receive $45.00. He took my personal check for $50.00. I got a money order back for forty-five.

Q. Did you get the paper at the time you gave him the check, or did you get the paper after the time you gave him the check? [22]

(Testimony of Ethel Holman.)

A. I got it right the day I gave him the check. In fact, I had this in my hand first.

Q. Why would he give you a receipt or a document showing $45.00 received, and you actually gave him a check for $50.00?

A. I was looking to see my personal check, but I don't have it with me. I can produce it. I will have it.

The Court: Do you live in town?

The Witness: Long Beach.

By Mr. Wegener: Q. Did you have any arrangement with the defendant about the disposition of the $5.00? Was it for wires or communications?

A. No, that was his idea; not mine.

Q. What did he say? Why did he put in $45.00 when you gave him $50.00? Did he say anything about the difference? A. No, sir.

By Mr. Wegener: Q. At the bottom of the document, where the defendant signed it,—would you refer to that section of the document?

The Court. He means this where it says "Lincoln, by C. J. Cusack."

The Witness: What do you want to know?

By Mr. Wegener: Q. Would you just read the signature there, signed by the defendant after "Carrier or Agent"? [23]

A. "Carrier" is crossed out, and then it says "or agent." Then over to right it says "Lincoln." Then his signature.

Q. In other words, the word "Carrier" was stricken out, but the word "Agent" remains exposed? A. That's right.

(Testimony of Ethel Holman.)

Q. You have stated that you were returned $45.00 by a money order? A. Yes.

Mr. Wegener: That is all.

The Court: Step down, please. Call your next witness. You may be excused, Mrs. Holman.

(Witness excused.)

FRANCIS DAMBACH,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Francis Dambach.

Mr. Champlin: This refers to Count VII.

Direct Examination

By Mr. Champlin:

Q. Where do you reside?

A. 1177 West 28th Street, Los Angeles.

Q. Did you live there on or about October 28, 1946?

A. No, I didn't. I moved there last April. [24]

Q. Where did you live in October, 1946?

A. At 1982 Bonsello Street, Los Angeles.

Q. Did you see the defendant Cusack on or about that date, October, 1946? A. Yes, I did.

Q. How did you arrange the meeting with Mr. Cusack? What directed you to him, or him to you at that time?

A. I saw an advertisement in the paper, a Drexel number to call. I communicated with him, and

(Testimony of Francis Dambach.)

talked to him on the phone, and asked him to come out to the house.

Q. Where did you see the advertisement?

A. In the Los Angeles Examiner.

Q. You don't remember the telephone number, do you?

A. Drexel 5 something. I don't remember the rest.

Q. What transpired at the time he called at your home? What conversation took place; that is, what did you say and what did he say?

A. Well, I told him that I had a few household goods that I wanted shipped out from Charleroi, Pennsylvania. I asked him—of course, the rate was quoted in the paper. The reason I called him was because he appeared to be cheaper than the rest. He said, "How much do you have?" He said, "It wouldn't be over a thousand pounds, would it?"

I said, "I don't imagine so, because there are only some heavy trunks, a few odds and ends." He said it wouldn't [25] amount to over a hundred dollars. When it arrived, it was over three hundred dollars.

Q. Do you know what company moved the household goods?

A. I think it was Von der Ahe, St. Louis.

Q. How much did you pay Mr. Cusack as to his part of the transportation? A. $20.00.

Q. Was that paid at the same time you signed some paper or he signed some paper closing the agreement? A. That's right.

(Testimony of Francis Dambach.)

Q. Did he sign any paper in your presence at the time you gave him the $20.00?

A. He signed,—it looked like a yellow sheet of paper, or a contract.

Q. Did he give that to you at the time?

A. Yes, he did.

Q. I show you this paper and ask you if that is the same one that you received at that time?

A. Yes, this is it.

Mr. Champlin: I would like to have this marked for identification Government's Exhibit 3.

The Court: All right.

The Clerk: Government's Exhibit 3 for identification.

(Shows the same to counsel.)

Mr. Champlin: The Government offers this exhibit in [26] evidence, your Honor.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Government's Exhibit 3 in evidence.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. Mrs. Dambach, the amount that you gave to the defendant at the time that this instrument was executed you gave to the defendant in a check at that time, did you? A. No, I gave him cash.

Q. He gave you this document which showed the receipt of the total amount of money?

A. That's right.

(Testimony of Francis Dambach.)

Q. Your shipment was loaded some later date from this instrument by some carrier and was delivered to your house here in Los Angeles?

A. Yes.

Q. It was through the instrumentality of the defendant that that transportation service was arranged? A. Yes.

Q. The original document was given to you by the defendant at the time you talked to him, it was a quotation given to you on approximately what he thought it would cost you to have the goods moved out here? [27]

A. That's right; he told me it would run around $100.00; otherwise I would not have sent for it. It wasn't worth any $352.00.

Q. When the shipment arrived you had to pay $352.00? A. That is right.

Q. Was that charged based on the weight of the shipment? A. That's right.

Q. It weighed more than you expected it would weigh? A. Yes, it did.

Q. The amount of money that you gave the defendant at the time the order was taken, was that amount of money deducted from the amount to be collected on delivery?

A. Now, I am not sure of that whether it was or not, because I never could find that one bill. I know the driver told me it amounted to $352.00 when he delivered it to the door. I didn't have the money to pay for it, and it had to go to storage.

(Testimony of Francis Dambach.)

Q. So later you had to have the goods moved from storage?

A. I paid the payments until I got it out.

Q. When you paid the money the defendant or whoever you paid the money to gave you a copy of the freight bill, the bill of lading of that shipment moving here from Pennsylvania? A. Yes.

Q. Do you have a copy of that with you? [28]

A. I think Mr. McGuigan of the National Van Lines has it. He was the one who took my furniture over from the storage.

Q. Did he give it to you when the goods were moved from the warehouse? A. No, he has it.

Q. What I am asking you, Mrs. Dambach, is that when you paid the charges, in other words, the $325.00, you got a receipt from whomever you paid the money to? A. Yes, sir.

Q. Do you have that with you?

A. Yes, I have.

Q. Can you produce that before the day is out for the inspection of the Court?

A. Yes, I have it.

Q. The receipt that I have which is an itemization that appeared on the receipt, it shows—

The Court: She doesn't have to read it because we can put it in as an exhibit unless you want to ask a question.

Mr. Wegener: I merely thought she might want to read it, your Honor, the itemization.

The Court: I can read it into the record.

Mr. Wegener: Would your Honor do that?

(Testimony of Francis Dambach.)

The Witness: This is the receipt when I paid the balance.

The Court: And you paid the balance on October 20th, [29] 1947, is that correct?

The Witness: That is right.

The Court: Pay to J. C. Ritchie for the National Van Lines, Incorporated—

Mr. Wegener: Just the section relating to the accrued charges and the payment, your Honor.

The Court: The National Van Lines.

Mr. Wegener: It looks like the invoice is the National Van Lines, Incorporated, May 6, 1947.

The Court: Mrs. Francis Dambach, 1177 West 28th Street, Lot No. 26269. Transportation charges from Charleroi, Pennsylvania, to Los Angeles, California, $10.92 cwt. $335.79. 3% tax $10.00. $345.87. Paid to C. J. Cusack $30.00—$315.87. $277.87 balance $80.00. And below that $80.00 paid but no indication when. Balance due $197.87. Then below that in pencil is: Paid to J. C. Ritchie for National Van Lines, Inc., 10-20-47.

By Mr. Wegener: Q. Mrs. Dambach, in looking at that receipt, the amount paid to the defendant was given credit to you on the amount of the bill, was it not? A. Yes.

Q. You mentioned that a St. Louis truck delivered the shipment. Do you remember the name of the truck or the carrier that delivered the goods here to you in Los Angeles? [30]

A. The name of the carrier?

Q. Yes, or the truck? A. Von der Ahe.

(Testimony of Francis Dambach.)

Mr. Wegener: That will be all.

Mr. Champlin: Nothing further.

The Court: We are about to adjourn until 2:00 o'clock this afternoon. The Court reminds you not to talk amoung yourselves or with anyone else on any subject connected with the trial of this case or to form or express an opinion thereon until the case is finally submitted to you.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m. of the some day.) [31]

Los Angeles, California, April 20, 1948.
2:00 o'clock p.m.

The Court: Let the record show the jury are in the box and the defendant is here in court with his counsel.

Mr. Champlin: The Government will call Mr. McGuigan.

OWEN McGUIGAN,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Champlin:

Q. What is your occupation, Mr. McGuigan?

A. Resident or district manager for the National Van Lines.

Q. Is that a transfer storage company or a van line that does business in interstate commerce?

(Testimony of Owen McGuigan.)

A. That is right, in 39 states.

Q. Your residence is here in Los Angeles, is that right?

A. My office is in Los Angeles, my residence is in Glendale.

Q. How long have you been in that capacity, Mr. McGuigan? A. Since July 5, 1946.

Q. Directing your attention to the date of approximately October 8, 1946, in connection with the testimony of the last witness, did you hear the testimony of Mrs. Francis Dambach? [32]

A. Yes, I did.

Q. Do you know a company by the name of the Von Der Ahe Van Lines of St. Louis?

A. Yes, the Von Der Ahe Moving Storage Company of St. Louis were at that time an agent to the best of my recollection for the Van Lines.

Q. Agent for your company?

A. That's right.

Q. Do you recall and do you know of your personal knowledge that the Von Der Ahe did move some household furniture for Mrs. Dambach of Los Angeles?

A. Yes, the National Van Lines; it was furnished with a billing issued by the Von Der Ahe people, our agents.

Q. Were you directed by subpeona to bring certain papers with you to the court room today in connection with that shipment? A. I was.

Q. Do you have those papers with you?

A. Yes, I do.

(Testimony of Owen McGuigan.)

Q. Produce them, please.

A. This is the entire file on the Dambach shipment.

Q. Open it and state what the papers purport to be. They gave the Von Der Ahe Company authority to bring their shipment to Los Angeles?

A. The Von Der Ahe people requested the National Van [33] Lines to furnish them with a bill of lading to move a certain shipment of household goods from Charleroi, Pennsylvania, to Los Angeles. This was done under date of December 26, 1946, on our Order 26269.

Q. That was dated December, 1946?

A. That's the date that this billing was issued according to this record.

Q. Is there a bill of lading or settlement sheet or some document customarily used in the trade that would indicate that shipment?

A. No, not in this file, this record. It might be in the Chicago office. They were not requested in the service; otherwise I would have them. However, I am familiar with the basis of settlement with the Von Der Ahe people in such matters as this.

Q. Do you know what the fare was and what was received?

A. In this particular shipment the Von Der Ahe people representing themselves as agents and sales agent National Van Lines hauling it in their equipment would have received 85 per cent, the net revenue.

(Testimony of Owen McGuigan.)

Q. The remaining 15 per cent, to whom would it go?

A. It would go to the National Van Lines as the certificate holder.

Q. Did your company authorize Cusack to intervene, to represent your company in any way in negotiating the contract? [34] A. Not at all.

Q. Did you authorize the Von Der Ahe Company to engage the services of Mr. Cusack in this transaction?

A. Not at all. We do not allow agencies to appoint other agents unless with a specific written authority, which was not done in the case of the Von Der Ahe Moving and Storage.

Q. To the best of your knowledge was any written authority given to the defendant Cusack to negotiate or engage in this transaction on behalf of your company or the Von Der Ahe Company?

A. There was no written authority from us as principal to engage his services to represent us.

Mr. Champlin: You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Mr. McGuigan, you stated that your principal, the National Van Lines, has authority to operate in 39 states? A. That is right.

Q. Would you tell the Court the scope of the operations of the non-radial?

A. They are non-radial and extend to every State in the Union with the exception of Utah, Ne-

(Testimony of Owen McGuigan.)

vada, Wyoming, Oregon, Washington, North Dakota, Vermont; and all the other 39 States except those mentioned. We move with unrestricted rights in all the other 39 States. [35]

Q. In other words, your company can pick up shipments—in other words, they can pick up and deliver anywhere between the 39 States?

A. Thats' right, between points and places in the 39 States.

Q. Do you know whether or not the Van Der Ahe people of St. Louis own carrier rights of their own?

A. I can state positively they do not have an individual operator between the termini in this case nor between Pennsylvania and California.

Q. I did not ask you that question. I asked if they have any authority at all.

A. I am not too sure. If so, it is confined to the Midwestern States.

Q. Are you familiar with the Von Der Ahe application that was filed for an extension with the Interstate Commerce Commission to extend their rights?

A. I have knowledge of their application.

Q. You must have knowledge that the Von Der Ahe people have interstate authority of their own on which to base an extension application?

A. It is not too clear to me what the scope is in regard to it. I do not concern myself with it too much as regional manager.

(Testimony of Owen McGuigan.)

Q. You say the Von Der Ahe people have no authority to [36] appoint sub-agents?

A. That is right.

Q. By what method does your company restrict this privilege?

A. The sales agent agreement under which the Von Der Ahe people operate plainly states they are sales agents and only they are entitled to use the name of this company, its national advertising and reputation, and if they were to create an agency they would have to have it in the form of a rider or a separate agreement which was not done in the case of the Von Der Ahe people.

Q. That would not be the case of the Von Der Ahe people under the I. C. C. authority. In other words, under the I. C. C. authority they could appoint their own agent within the scope of their own authority?

A. Not even within the scope of their own authority, since the National services the same territory and to that extent he is in competition with us. Therefore we would not as a sound business principle give him that authority.

Q. You say you have been engaged since July 6, 1946, as division manager, or in a similar capacity out here with the Van Lines?

A. That is the date of our managership of the Pacific Coast area.

Q. How many years experience do you have?

A. Close to 20 years' experience. Since 1929.

Q. How many years [illegible] in that period? A. Actually close to four years.

(Testimony of Owen McGuigan.)

Q. Before July 5th, 1946?

A. Prior to July 5th, 1946. I spent a three months' training period with the National Van Lines at Chicago. Previous to that I was with the United States Freight Company, in which a lot of my work was involved with household goods movement for about two years.

Q. In pool carring of household goods?

A. Pool carring.

Q. The Von Der Ahe Company was your agent which you mentioned was assigned to bring this load to California? A. That's right.

Q. You mentioned they are not privileged to maintain a sub-leasing or agent agreement for you when it comes to the sales end of your business?

A. That's right. We don't allow them to contract on our behalf.

Q. Are you cognizant with the Motor Carriers Act? A. I am.

Q. Does Von Der Ahe have a carrier authority of his own, couldn't he book it on his own authority on the bill of lading with the National Van Lines?

A. Not with the National Van Lines since the National [38] Van Lines has direct service between the termini involved in this case.

Q. Are you familiar with the Allied Van Lines cases which have been before the Commission in the last year?

A. I am not familiar with the Allied setup.

Mr. Champlin: I object to that.

The Court: Objection sustained.

(Testimony of Owen McGuigan.)

By Mr. Wegener: Q. Do you know of any other company augmenting their facilities with this type of equipment?

A. I can speak only with authority of my own company.

Q. Referring to this invoice and also to the copy of the order for services, does that invoice show the same as Mrs. Dambach testified, that the amount paid to the defendant Mr. Cusack was deducted from your freight charges?

A. Apparently that is right. I haven't seen the invoice copy, but I would say this is a duplicate of the same.

Q. Does that state the amount received by Mr. Cusack and acknowledge that the moneys received by him are deducted from the amount of the freight charges?

A. Certainly and properly so. I might enlarge on that.

Q. You have answered.

The Court: You may do so.

A. But since Von Der Ahe had without our knowledge and consent engaged the services of Mr. Cusack, and since he had taken this deposit from the shipper, we felt duty bound to [39] credit the shipper with the money given Cusack, and debit it to the Von Der Ahe account, which was done. Whether or not the Von Der Ahe people recovered from Mr. Cusack I don't know.

Q. Ordinarily what would have been the ordinary procedure as a carrier?

(Testimony of Owen McGuigan.)

A. To refer the shipper to the Better Business Bureau or an attorney to prosecute the matter.

Q. Don't you, before you unload goods, require the consignee to pay all the charges in full before you release the goods? A. Yes, we do.

Q. That $20.00 was part of the consideration assumed under your tariff in delivering the shipment from between Charleroi and Los Angeles, and you acknowledged the $20.00 when you delivered the shipment from your possession.

A. We acknowledged it, Von Der Ahe having received it through an unauthorized agent, Mr. Cusack, and we protected the shipper's interest by allowing them to collect themselves from the Von Der Ahe people. What they did from there on was no concern of ours, since they acted unauthorized in accepting his services.

The Court: What do you mean, that you did not make allowance for the $20.00?

The Witness: Yes, your Honor, we did. We subtracted that amount from the shipper's total charges at the time of [40] delivery.

The Court: You said you collected it from them.

The Witness: We debited their account, which of course was in effect collecting from the Von Der Ahe people.

The Court: You made them pay for that money?

The Witness: Yes.

By Mr. Wegener: Q. Have you had any other occasions, to your knowledge, in the management of the National Van Lines, where deposits may have

(Testimony of Owen McGuigan.)

been taken by someone not the agent of the National Van Lines, and the truck arriving at destination would not acknowledge the money paid to the unauthorized agent?

A. That difficulty has not arisen in my recollection. We try to keep the sales agent within the regulations as to avoid the friction of that type.

Q. In other words, to your knowledge you have never had that experience?

A. I can't recall another case like that at the moment.

Q. One copy of this order is for service, and one copy is the freight bill.

A. Yes, that is the freight bill.

Q. One is a copy of the freight bill. Will you explain the hieroglyphics relating to the defendant Cusack's money?

A. Certainly. Paid. Payment made of $30.00 on [41] February 28th. Another partial payment was made March 18th, 1947. Of course they paid to Cusack $30.00 and our Chicago office was instructed to collect from Von Der Ahe and give Mrs. Dambach credit for it.

Q. You instructed your Chicago office to honor the $30.00?

A. Certainly, as a matter of integrity they had to.

Q. Did you have authority to condone the unlawful act of the sub-agent?

A. As the principal, if the agent was engaged in an unlawful act we would go to any extent to pro-

(Testimony of Owen McGuigan.)

tect the interests of the shipper, which we did in this case.

Q. If you had stayed within the confines of your carrier obligation, you would have demanded that the shipper pay the full $30.00 plus other charges, then you would have had the shipper go back to Mr. Cusack for the original money?

A. That's right, had not our agent admitted that Von Der Ahe had received that deposit; he was obligated to honor that amount in question.

Q. In other words, you were forced to condone his act.

A. We were forced to condone the act. We said in effect, Mr. Von Der Ahe you as our agent, we haven't authorized you to collect the deposit and we of course prefer that you give it back to the people from whom it was taken.

Q. So actually the money was collected by the Von Der [42] Ahe people, and not by the defendant? A. Collected by the defendant.

Q. Do you know whether or not the defendant gave that money back to the Van Der Ahe people?

Mr. Champlin: That is immaterial, your Honor. The witness just testified that it was to justify the credit. It is a matter between principal and agent.

A. Will you repeat the question?

The Court: You may answer.

A. We have the evidence in the letter of February 6, 1947, from the Von Der Ahe Storage and Van Company that this deposit was included in a

(Testimony of Owen McGuigan.)

check sent by Mr. Cusack to them for $158.50, which was returned because of insufficient funds.

Q. In other words, the check in that settlement was apparently made by the defendant and your agent, the Von Der Ahe people in St. Louis?

A. There was a relationship there in regard to this deposit.

Q. Would you state whether or not the defendant could roughly bill business for the Von Der Ahe people as a common carrier in and out of their own office?

Mr. Champlin. Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

By Mr. Wegener: Q. On your trip leasing of vans, what [43] is your company's procedure in this regard.

A. The Von Der Ahe people and people similarly placed will register their order with us as a matter of course, other than for an estimated shipment, and we service it with our own equipment or authorize them to haul it under a subcontract and gave them a lease to do it.

Q. Are those commonly called a trip lease?

A. They are called a trip lease arrangement.

Q. On that trip lease authority is given for the van to travel between the point of origin and the point of destination? A. That's right.

Q. The trip lease authorizes the movement of the van from Charleroi, Pennsylanvia, to Los Angeles

(Testimony of Owen McGuigan.)

as a movement of a truck operating under authority of your company? A. Yes.

Q. But the shipments which make up the load are identified by means of the trip manifest which accompanies that trip lease. The trip lease itself does not set forth which shipments comprise the van load but refers to the manifest.

Q. Who makes up the manifest?

A. Those are prepared in Chicago.

Q. Does your Chicago office actually make up the papers or does the agent make up the papers and send copies of them to the Chicago office? [44]

A. Those papers were made out by our Chicago office and are sent to Von Der Ahe. Von Der Ahe completes them once the weight is determined.

Q. Do you have an agency in the State of Colorado? A. Yes.

Q. If the agent in the State of Colorado books a shipment and it moves from Colorado to some point the customer wants it to be moved, your procedure is that he must first communicate with Chicago and then Chicago makes up the papers and sends them back to Colorado before he has authority to ship on the trip lease?

A. Either that or he has his own papers.

Q. Isn't that the usual procedure, in authorizing your agents to do so?

A. Not at all. We don't allow it.

Q. Has there ever been an instance where it has been done.

(Testimony of Owen McGuigan.)

A. I imagine there have been instances but I don't recall any offhand.

Mr. Champlin: I object to that as calling for a conclusion.

The Court. He has answered.

By Mr. Wegener: Q. If the Von Der Ahe people secured this shipment and they had it on their truck moving from Charleroi to Los Angeles, on their bill of lading they show [45] the National Van Lines as the common carrier from that point on to destination, to the best of your knowledge would that be a transaction that commonly occurs in the moving business?

A. That would be a very uncommon occurrence. It would in effect allow competition in the territory which we ourselves serve.

Q. Does your agency contract with the Von Der Ahe people specifically prohibit it?

A. It does not prohibit it, but they are not given indiscriminate right to make the lease trips. The National Van Lines would not permit any agent to haul within our territory for a segment of the through haul.

Q. You paid a sales commission to the Van Der Ahe people as agent of the National Van Lines?

A. I would say so.

Mr. Wegener: I have no further questions.

Redirect Examination

By Mr. Champlin:

Q. Did you authorize or ratify, in the true sense of the word, this transaction Mr. McGuigan, on be-

(Testimony of Owen McGuigan.)

half of the National Van Lines? Did you ratify the transaction in which the defendant Cusack collected commission?

A. No, I did not ratify it at all. I don't know who originated the order.

Q. In other words, the commission you paid was a [46] commission you were obligated to pay under your contract with the Von Der Ahe people?

A. Yes.

Q. So far as you were concerned you never recognized Mr. Cusack either as an employee or as an agent? A. That's right.

Mr. Champlin: That is all.

LOUIS NAULT,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Louis Nault.

The Court: What count is this?

Mr. Champlin: Count III.

Direct Examination

By Mr. Champlin:

Q. Where do you live at present, Mr. Nault?

A. Long Beach.

Q. Did you live there on or about September 4, 1946? A. Yes, I did.

Q. What is your occupation?

A. I am a boiler maker.

Q. Do you know the defendant in this case, Mr. Clem J. Cusack? A. Yes. [47]

(Testimony of Louis Nault.)

Q. Did you have any transaction with him on or about the fourth of September, 1946.

A. Yes, I did.

Q. Tell the jury what that transaction was or what it consisted of.

A. I had some furniture to move from Fremont, Nebraska, so I contacted this telephone number in the Long Beach newspaper, and they told me they couldn't get hold of him, but that he would call me up in about two hours, which he did, and he stated that he would come out to the house, which he did.

Q. What conversation took place?

A. I asked him about moving the furniture, how soon I could get it, and he said he could get it out in not less than 30 days.

I asked him how much we would have to pay and he said $100.00.

Q. Did you pay him $100.00?

A. I went to the bank and drew $100.00 and gave it to him that day.

Q. Did you receive a receipt? Did you receive some contract or paper, which he signed in your presence, a receipt for the $100.00 that you paid him?

A. I believe I have it. I am not sure.

Q. Was it a yellow paper? [48]

A. It was a yellow paper similar to this. I mislaid it somehow; I don't have it with me.

Q. Was the furniture or the household goods you had in Fremont, Nebraska, moved to California by the defendant?

A. They were moved by another line.

(Testimony of Louis Nault.)

Q. Which line was that?

A. The National Lines.

Q. Was that the same as the National Van Lines?

A. Or the Van Der Ahe. I have got the receipt for the National Lines.

Q. Did you see the trucks when they arrived?

A. Yes.

Q. Did you notice the name on the trucks at the time?

A. It was Van Der Ahe. I know it was now.

Q. That is the same company that has been referred to in the previous testimony, is that right?

A. I guess it is, yes.

Q. Did you pay the rest of the bill, or were there any other charges besides the $100.00 which you paid?

A. When the truck came with the furniture I paid the balance which was $310.00.

Q. That's in addition to the $100.00 paid?

A. They deducted the $100.00. The furniture was to be delivered in 30 days. It came three months and a half later.

Q. I don't understand the answer [49]

A. It was delivered three and one-half months later instead of 30 days. When I tried to contact Mr. Cusack I could not get hold of him. The phone answered and said they found out that he was not on the up and up and they discontinued his service in Long Beach.

Mr. Champlin: You may cross examine.

(Testimony of Louis Nault.)

Cross Examination

By Mr. Wegener:

Q. Mr. Nault, you just made the statement that you tried to contact him and you found out that he was not on the up and up?

A. That's what the lady over the telephone told me, sir.

Q. The lady on the telephone told you that?

A. Yes, that's right, the number I called from.

Q. What number did you call?

A. I can't recall but I think I can get it.

Q. Are the facts clear in your mind as to exactly what happened relating to the telephone conversation and the conversation which you did have with the defendant? A. Yes, I called this number up.

Q. In your conversation, when you talked to him on the telephone, did you make any inquiry of the answering party on the telephone as to who he represented as agent or carrier of an agent?

A. No, it had the Lincoln Van & Storage Company when [50] I called this number but she said she would get in touch with him, that he was not there at the time, but that he would come out and see me, and two hours after he came out to the house.

Q. The Van Der Ahe people you stated delivered the goods, is that correct? A. I think that is right.

Q. Did you have any conversation with these people at all? A. No.

Q. In other words, you had nothing to do with the Van Der Ahe people actually picking up your goods?

A. He sent me a telegram one night and told me

(Testimony of Louis Nault.)

that my furniture would not be released or would not be here from Fremont, Nebraska. So I phoned back my daughter that night and told her to check them, and she wired back and said nobody was there to call for the furniture and I wired her right back and told her not to let the furniture go until the Van Company came after it, and she answered she certainly would not. When the Van Company came to get it they looked okay, so they let the furniture come on out.

Q. The $100.00 that you gave the defendant when the shipment was delivered, did you have to pay the full amount of the bill?

A. That $100.00 was deducted.

Q. The actual transaction was that you called the [51] Lincoln people and then through the Lincoln Transfer Company your goods were picked up in Fremont, Nebraska, and brought to California?

A. Yes.

Q. Did you not call any outside company, as the other witness testified, and cancel the order and obtain someone else to handle the shipment?

A. No, I went to the Interstate Commerce office and I went to the Better Business Bureau at Long Beach and to the Police Department and they called Mr. Cusack and told him what to do. He got busy.

Q. You say you were at the Interstate Commerce Commission office? A. That's right.

Q. Did you ask him for advice how to proceed?

A. No, but I wanted to find out what could be done in that kind of a transaction.

(Testimony of Louis Nault.)

Q. Did you know that your shipment was under the purview of the Motor Carriers' Act? Was that the reason you went to the office of the Interstate Commerce Commission?

A. That would be a reason, yes.

Q. If you knew that your shipment was under the Interstate Commerce Act, and you had been properly advised why didn't you investigate the Lincoln Transfer and Storage Company first? [52]

Mr. Champlin: I object to that as argumentative.

The Court: Objection sustained. This is not a private lawsuit by this man against someone. This is a suit by the Government of the United States, and the mere fact that he may have known the man was violating the law does not make any difference. He is not seeking to recover money for something he did not get. He says that his goods were transported. This is a simple lawsuit, and the only question is, was this man authorized to act as an agent for somebody else? If so, all right; he is not guilty of any offense. If he was not, then he was a broker who had no license and he is guilty. It is a very simple action. The thing that makes it complex is that there are ten transactions.

Q. Then to review all the testimony which you have given, would you say that a simple statement of the facts that you have presented is, that you called the Lincoln Transfer and that you gave him $100.00 deposit; that the Von Der Ahe people undertook to deliver the goods to California and collected the difference between the $100.00 of the freight charges,

(Testimony of Louis Nault.)

and you paid the balance upon the delivery by the Von Der Ahe people? A. I did that, yes.

The Court: Any redirect?

Mr. Champlin: No redirect examination.

The Court: Step down. Call you next witness.

(Witness excused.) [53]

Mr. Champlin: The Government will call Mr. McGuigan.

OWEN McGUIGAN

a witness recalled by and on behalf of the Government, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Champlin:

Q. Mr. McGuigan, did you bring with you certain papers in connection with the Louis Nault shipment to California by the Von Der Ahe people of St. Louis? A. Yes, sir.

Q. In this particular transaction, the contract made September 4th, 1946, with Mr. Nault.—is this transaction similar to the other one you testified to concerning the shipment to Mrs. Dambach?

A. I believe it is identical.

Q. Will you explain what your company had to do with this shipment to Mr. Nault?

A. This was another case where our company received this request from Von Der Ahe to service this shipment, as one of their own orders, and consequently we are authorized to do so, a trip lease evi-

(Testimony of Owen McGuigan.)

dently to make a pickup, as part of our van load, and assign it for westward movement.

Q. On whose bill of lading was this shipment of goods shipped?

A. This was picked up by Von Der Ahe acording to my [54] papers, on January 14, 1947, and a bill of lading was issued by the National Van Lines out of the office at 2431 Irving Park Road, Chicago.

Q. Did your company in this case authorize the defendant Cusack to make any engagements or contracts or agreements to transport goods over either your lines directly or your agent's line, Von Der Ahe Company of St. Louis?

A. No, this was regarded as an outright transaction between Von Der Ahe and the National Van Lines.

Q. Von Der Ahe in this case would be acting in the scope of their authority, is that correct, in carrying on this transaction as your agent?

A. If they had themselves arranged this transportation; but they are not authorized or empowered to accept orders from another agent or somebody's agent, without our specific authority to do so.

Q. Did your company authorize the defendant Cusack in this case, in the Nault shipment, to take the order or make any contracts on behalf of your company or accept any money on behalf of your company? A. Not at all.

Q. Do you have the bill of lading with you?

A. I do, and the settlement sheet that you requested

(Testimony of Owen McGuigan.)

Q. These are part of the official records of your company, is that correct? [55]

A. That is right.

Q. For the time being are you custodian of those papers?

A. Yes. That is the bill of lading.

Q. I would like to have it marked for identification.

The Clerk: Plaintiff's Exhibit 4 for identification.

Mr. Champlin: The Government offers exhibit for identification No. 4 into evidence.

The Court: Admitted.

The Clerk: Four in evidence.

By Mr. Champlin: Q. I would like to ask one more question, Mr. McGuigan, on the relationship of a company like the Von Der Ahe in this case: Do you have any leasing agreement with them in which under your authority for interstate transportation you can lease their trucks to haul any shipment such as this one from Nebraska to California?

A. Yes, we do that occasionally.

Q. To the best of your knowledge was that the situation in this case?

A. Yes, I am sure the Von Der Ahe Company moved under a bona fide trip lease.

Q. It would travel under your shipping?

A. Under the National Van Lines all the way.

Mr. Champlin: That is all. [56]

(Testimony of Owen McGuigan.)

Cross Examination

By Mr. Wegener:

Q. That copy of the bill of lading, marked Plaintiff's Exhibit No. 4 on the bill of lading, I would like, if you will, to review this just a moment. In this second section where it says "Consigned to" and "Delivering carrier," in the space provided for "Delivering carrier" whose name is there?

A. Unless one wanted to be technical I should say the National Van Lines, unless another carrier is involved.

Q. The question is whose name appears there as the delivering carrier? A. It is left blank.

Q. On the freight bill,—the settlement sheet with the Von Der Ahe people it shows there apparently where moneys were collected by the delivering carrier which was Von Der Ahe on his van, and you have charged him with full amount of the invoice.

A. That is right.

Q. Then you have credited Von Der Ahe back with 85 per cent of the transportation revenue, which apparently is his discount which he earned for hauling the shipment out here. A. That's right.

Q. The note at the bottom says "Subject to correction." Just what does that mean? [57]

A. That means this: As I told Mr. Nault before he came on the stand there has been an error in weight on this shipment of $87.44 which he will get. In other words, authority is made to make the refund to Mr. Nault as soon as I secure his new address which I have.

(Testimony of Owen McGuigan.)

Q. What is the nature of the offset which resulted in $87.00 refund?

A. In the correct tabulation of the weight by the Von Der Ahe people, evidently they collected final charges in cash, which was why they are charged with the entire collection. They withheld it.

Q. Did the Von Der Ahe people have a certified weight slip from the public weighmaster on delivery of the goods covering the freight charge?

Mr. Champlin: I object to that as calling for the conclusion of the witness.

The Court: What is the question?

(Question read by the reporter.)

The Court: I will sustain the objection. It is not material.

Mr. Wegener: Your Honor, under the regulations of the Interstate Commerce Commission there must be a certified slip accompanying it.

The Court: We are not interested in that. He has admitted they made a mistake. Mr. Nault is the gainer by the [58] refund which he has coming.

Mr. Wegener: The point I am trying to arrive at, your Honor, is that the witness previously has testified to the exactness and accuracy in which he conducted the operations of their business. Now we desire to discover why they have erroneous weight slips.

The Court. He is not on trial. It does not go to his credibility. All I am interested in it whether this man had authority to represent these people as

(Testimony of Owen McGuigan.)

agent and employee. We are not interested in their method of doing business.

Mr. Wegener: The method has a great deal to do, your Honor, with whether or not there is a brokerage act involved.

The Court: This has nothing to do with that as to whether they got good weight or bad weight.

Mr. Wegener: What I am trying to arrive at is whether or not Von Der Ahe began shipment at the point of origin under his own authority.

The Court: You are not asking that. Objection sustained.

By Mr. Wegener: Q. On this bill of lading the name National Van Lines, Inc., appears.

A. I can't say whether this bill of lading was made up by Von Der Ahe of St. Louis or ourselves at Chicago. There are no initials on this bill. Otherwise I can't state positively just who made it up, when and where.

Q. It is your company's procedure that unless you [59] initial the document you are not certain who is the one who made up the instrument?

A. It is our practice, wherever and whenever we can get people to do it to 100 per cent initial all documents concerned with our movement so we will know who made errors, when made, or who has prepared the papers.

Q. So someone either in the Chicago office neglected to do so, or it was made up by Von Der Ahe and he neglected to do so?

(Testimony of Owen McGuigan.)

A. Von Der Ahe may have made it up and neglected to do it. It is just company procedure in the office.

Mr. Wegener: That is all.

Redirect Examination

By Mr. Champlin:

Q. Do the Von Der Ahe people have authority from the Interstate Commerce to haul on their own authority from this point in Nebraska to California?

A. I can state definitely they do not have authority to operate between points in Nebraska and California.

Mr. Champlin: That is all.

At this time we would like to have marked for identification two documents I believe Government's exhibits for identification 5 and 6.

The Clerk: Government's Exhibit 5 and Government's Exhibit 6 for identification. [60]

Mr. Champlin: At this time the Government offers in evidence two documents which purport to be certificates and statements from the Secretary of the Interstate Commerce Commission. Washington, D. C., which are submitted under Rule 27 of the new Criminal Rules of Procedure which incorporates by reference Rule 44(b) of the Civil Rules, which states that a certificate of a negative nature may be submitted by the proper custodian.

The Clerk: Plaintiff's Exhibits 5 and 6 admitted in evidence.

Mr. Champlin: At this time the Government suggests that the Court read these two documents to the jury.

The Court: You may read them later on. I merely volunteered to do that reading because it is not customary to have the witness read them. So long as there is no witness on the stand you may interrupt the proceedings to read the documents. I will let you read 5 and 6. Do you want both?

Mr. Champlin: If the Court please, I would like to read both at this point because they pertain to all the counts in the information and pertain to the whole case.

The Court: You don't need to read the Notary's certificate. Merely state it was verified by a Notary, giving her name.

Mr. Champlin: Exhibit No. 5 is a certificate and statement as follows: [61]

"I, W. P. Bartel, do hereby certify that I am Secretary of the Interstate Commerce Commission and as such have in the District of Columbia the custody of all records of certification of public convenience and necessity and permits issued to common and contract carriers by motor vehicle, and of all applications therefor, and of all other documents filed with said Commission pertaining to said applications, and of all records pertaining to temporary authorizations issued to common and contract carriers by motor vehicle, pursuant to the provisions of the Interstate Commerce Act (49 U. S. Code, Secs. 5, 306, 307, 309, 310a, and 312 (b)) and pursuant to the orders, rules and regulations

promulgated thereunder (49 C.F.R., Secs. 179.0-179.6, 180.1, 180.50, and 215.1-215.4); and that after diligent search no certificate of public convenience and necessity, per, it, or temporary authority issued to Clem J. Cusack, defendant herein, and no application for authority of the above-specified tenor filed by or on behalf of said defendant has been found on file and no record of the filing of any such document has been found to exist in my said office.

"In Witness Whereof, I have hereunto set my hand and affixed the seal of the Interstate Commerce Commission on this 12th day of April, 1948."

Certified by Lillian L. Cooley, a Notary Public in and [62] for the District of Columbia.

Exhibit No. 6 states as follows:

"I, W. P. Bartel, do hereby certify and state that I am Secretary of the Interstate Commerce Commission, and as such have in the District of Columbia the custody of all records of licenses issued to brokers of transportation by motor vehicle, and of all applications therefor, and of all other documents filed with said Commission pertaining to said applications pursuant to the provisions of the Interstate Commerce Act (49 U. S. Code, Sec. 311. (a)), and pursuant to the orders, rules, and regulations promulgated thereunder (49 C.F.R. Cum. Supp. 7.5, 6 F. R. 2523); and that after diligent search no license issued to Clem J. Cusack, the defendant herein, and no application for license of the above-specified tenor filed by or on behalf of

said Clem J. Cusack has been found on file and no record of the filing of any such document has been found to exist in my said office.

"In Witness Whereof, I have hereunto set my hand and affixed the seal of the Interstate Commerce Commission on this 23rd day of January, 1948."

Signed by

W. P. BARTEL,

Secretary Interstate

Commerce Commission.

The certificate again is signed by a Notary Public, Lillian L. Cooley, Notary Public in and for the District of [63] Columbia.

MRS. J. H. OLIVER,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. Mrs. J. H. Oliver.

The Clerk: What is your first name?

A. Irene.

Direct Examination

By Mr. Champlin:

Q. What is your residence, Mrs. Oliver?

A. It is in Los Angeles. Do you want the address?

Q. Yes, if you please.

A. 7526 South Brighton.

Q. What is your occupation?

A. I am a housewife.

(Testimony of Mrs. J. H. Oliver.)

Q. I direct your attention to the approximate date of June 13, 1947. This pertains to Count I, if the Court please. Did you have an occasion to see or talk to the defendant Cusack at that time?

A. Yes.

Q. Will you state in general what your conversation was and what you talked to him about on that day?

A. Well, I called him up, from the ad. I saw in the paper, that I looked in; I saw one ad in there that I thought [64] was a reliable company. I called him up, and I have called up a couple of other transfer people, and some of them did not go south into San Antonio. So I got this man and he said he would be right out, and he came out, to estimate the load. Then he came in the house and I talked it over with him. He said he would have to have a deposit of approximately one-third of the weight, if I wanted to have a reservation on a truck that would be going out within a few days; and this was the way I received space in the truck.

Q. Did he require you to pay some money at that time?

A. Yes. We gave him $45.00. He estimated the load at about 2,000 pounds.

Q. Where were the household goods at that time?

A. They were in our garage at this address.

Q. That is in Los Angeles? A. Yes.

Q. Where was it you desired them to be shipped to? A. To San Antonio, Texas.

(Testimony of Mrs. J. H. Oliver.)

Q. Did he represent any particular company he worked for?

A. He said he was the Lincoln Transfer Company.

Q. Did he transport or arrange or cause to be transported your household goods to San Antonio, Texas? A. Yes, after about six weeks.

Q. Did you see any trucks or vans come to your house [65] to pick up the goods?

A. Yes, about, I think it was the 9th of July, he called up that there would be someone come out and pick up the freight. My husband asked him if the freight was going right out. He said as soon as the truck was loaded. So a big truck came up and picked up the furniture. It was a Von der Ahe—I don't remember the name.

Q. To refresh your memory, was it Von der Ahe Company, St. Louis? A. Yes.

Q. Did they transport your goods directly to San Antonio then?

A. The freight did not arrive, and did not arrive, and I had been writing back and forth to my son all this time. So it was around the last of the month Mr. Cusack called up and said, "Your freight is in transit and should be there on Monday." So when my son's freight arrived at San Antonio they asked this driver where it had been and he said, "Why, I came right straight through. I picked this stuff up in the basement of some apartment house."

(Testimony of Mrs. J. H. Oliver.)

Q. Did you have it stored in your home in the basement? A. No, it was in our garage.

Q. Did you authorize anybody to store it in transit?

A. No, we absolutely did not, we asked especially to leave it right there until it was ready to go out of town— [66] leave it right at our garage.

Q. Did you pay the full freight bill?

A. No, that was paid in San Antonio.

Q. But you did pay some $45.00?

A. $45.00.

Q. Did he sign any paper or anything that purported to be a contract at the time you paid the money? A. Yes, he did.

Q. You don't happen to have that with you, do you? A. It is here some place.

Q. Is this the paper that you saw the defendant sign his name to in your presence at the time he took your money and gave you the papers?

A. Yes.

Q. Was it a yellow piece of paper similar to this?

A. Yes, it was. And at that time he said, "Well, we will have to send you a certified copy of the weight," and we never had a certified copy of the weight yet. And when we got in touch with him about the insurance there was no way of getting in contact with him and he ignored letters.

Q. Did he represent to you at the time that he was taking these orders or making contracts for

(Testimony of Mrs. J. H. Oliver.)

any other company other than the Lincoln Van & Storage?

A. No, he did not. He said he had trucks going in a short time and would see that everything was all right. [67]

Q. Was there any explanation by him of why the Von der Ahe Company got them rather than the Lincoln Storage Company? A. No.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. When the shipment was delivered in San Antonio was the amount of money paid to the defendant here in Los Angeles deducted from the amount of the bill? A. Yes, it was.

Q. When you first talked with the defendant, just what was your conversation? Did you ask him how he could move your furniture to San Antonio? Just tell us what you can.

A. I called and asked him if he shipped down to that part of the country and what his rates were. He said yes. I asked him how soon he thought he could get it shipped. He said it wouldn't be very long because he had trucks going out every day.

Q. Did you call other companies other than the defendants? Didn't you call any other company to find out what kind of service they could give or the rate they could charge?

A. I called other companies, yes, and they said they shipped straight through to Chicago and did not go down in that direction. Some of them said they could transfer the freight. This man said he

(Testimony of Mrs. J. H. Oliver.)

shipped it right through and [68] could take care of it in a few days.

Q. In your conversation with the various companies you did not ask them particularly, or you did not know particularly just how they could consummate the transaction? You were just interested in having the furniture moved from Los Angeles to San Antonio? A. Yes, to my son.

Q. You say the truck that loaded the goods at your garage was, to the best of your knowledge, a Von Der Ahe truck? A. Of St. Louis, yes.

Mr. Wegener: No further questions.

Redirect Examination

By Mr. Champlin:

Q. I would like to ask you if this is the statement or paper given to you at the time you paid the $45.00, Mrs. Oliver? A. Yes, that is.

Mr. Champlin: I would like to have that marked Government's Exhibit for identification No. 7.

The Court: It may be so marked.

The Clerk: Government's Exhibit 7 for identification.

Mr. Champlin: The Government offers in evidence Government's Exhibit for identification No. 7.

The Clerk: Is it admitted, your Honor?

The Court: It may be received. [69]

The Clerk: Seven in evidence.

Q. By Mr. Champlin: Counsel asked you on cross examination if you saw any other advertisement or where you saw the advertisement as to which you contacted Mr. Cusack?

(Testimony of Mrs. J. H. Oliver.)

Examiner, and one in the telephone book. There was a large ad in the phone book.

Q. Was this the type of telephone book that you saw the first one in? A. Yes.

Q. Would you recognize the same ad if you saw it, if you saw it in the book?

A. Yes, there were two Lincolns. One was the Transfer and one was the Van and Storage.

Q. I will ask you if this is the same ad you saw in the telephone book?

A. Yes, and that is the same number.

Mr. Champlin: I would like to have this marked for identification as the defendant's advertisement in the book.

The Clerk: Merely the page?

Mr. Champlin: Page 118 of the classified ads.

The Clerk: Shall I detach the page?

The Court: I think you had better detach it.

The Clerk: This is Plaintiff's Exhibit 8 for identification. [70]

Mr. Champlin: If the Court please, I would like to hold this ad temporarily before offering it in evidence until I can obtain the book proper. This is October, 1947. This was earlier than that.

The Court: I don't think you need another book. The witness has testified that it looked like the one she saw.

Mr. Champlin: She said it was the same ad.

The Court: You may rely on her statement.

Mr. Champlin: In that case I would like to offer it in evidence.

(Testimony of Mrs. J. H. Oliver.)

Mr. Wegener: Your Honor, I object to entering this into evidence. It would not be very difficult to get the proper book to show the ad she may have seen at the time this shipment was made. This was a subsequent ad. The ads were changed by the company and the schedules as the books came out. This came out in October, 1947, and the offense charged was committed in June, 1947.

The Court: The witness, however, states that this was like the ad she saw. If you want to contradict it, you may secure a copy of the other book.

Mr. Wegener: The book in existence at the time I thought would be more proper. So far as I know it will be apparently the same ad.

The Court: Counsel has offered to produce it. I think he is entitled to have this offered on the witness' statement [71] that she saw a similar ad on the same page. I will overrule the objection. If the Government wants to produce additional proof it is up to counsel. However, he is entitled to have that in now on the showing he has made.

The Clerk: Plaintiff's Exhibit 8 in evidence.

The Court: The question is not what ad she answered. The question is what was done afterward, after she talked with the defendant.

Mr. Champlin: That is all.

Recross Examination

By Mr. Wegener:

Q. Mrs. Witness, in the advertisement that you see there, under the name "Lincoln Transfer &

(Testimony of Mrs. J. H. Oliver.)

Storage Co." would you read what the ad says underneath the name?

A. "Agent 601 South Vermont Ave."

Q. That's right. Then it states the telephone number, "Drexel 5297." A. Yes.

Q. Under the name it shows "Agent". In other words, the ad itself by virtue of the wording, when you saw the book you also saw the word—

Mr. Champlin: I object to that as calling for the conclusion of the witness. She is not capable of answering whether he was the agent or not.

The Court: It is an argument. The ad speaks for [72] itself.

Q. By Mr. Wegener: When you talked with the defendant did you ask him any questions as to whether or not he was acting as agent for anybody else? A. No, I did not.

Q. You just called and placed an order to move the goods from Los Angeles to San Antonio?

A. When he answered the phone he said this was the Lincoln Transfer Company.

Mr. Wegener: That is all.

(After admonishing the jury, the Court here took a short recess.)

(Short recess.)

The Court: Let the record show the jury is in the box and the defendant in Court with his counsel.

MARIE GERMANN,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: Your name, please?

The Witness: Marie Germann.

Direct Examination

By Mr. Champlin:

Q. Where do you live, Mr. Germann?

A. Now?

Q. Yes. [73]

A. 1714 East 55th, Long Beach.

Q. What is your occupation?

A. Housewife.

Q. I direct your attention to February 26, 1947, where were you living at that time?

A. 5029 Walnut.

Q. Long Beach? A. Yes, Long Beach.

Q. Did you, on or about that date, have occasion to meet and talk to Mr. Cusack, the defendant?

A. I did, yes.

Q. What was the occasion for it? How did you happen to meet him?

A. There was an ad run in the Press Telegram, and it said to check for return rates on loads or something to that effect. We thought we could save a little money and call that number, a Long Beach number 32107. The man on the phone said yes they would have somebody out, and they were out in an hour. It was Mr. Cusack. He comes in. He looks

(Testimony of Marie Germann.)

our place over and said sure he would ship our furniture. I said, "Are you the Lincoln Van & Storage?" He said he was not. He said he was not affiliated with the one in Seattle. He was truthful in that. Anyway, he said he could take our stuff any day we would call him. So I called. He sent a nondescript van out which had no name on it at all. He took the [74] $50.00 from us.

Q. Where was it you desired the household goods be shipped? A. Seattle.

Q. Seattle, Washington? A. Yes.

Q. You asked him if he was affiliated with some company in Seattle? A. Yes.

Q. And the name of that company?

A. The Lincoln Van & Storage.

Q. Do you know what company the defendant represented himself to be?

A. He said he was the Lincoln Van & Storage in Los Angeles.

Q. He said he was affiliated with the Seattle people?

A. No. I asked him that and he said he was not.

Q. Did he transfer your goods to Seattle?

A. No, he did not. He took the money. He went away. Then I called him and said our goods were ready and he sent a van—at least a van came. It had no name on it. It came to the house and took the goods away. Then he called me on the phone, or I called him, and he said, "I will keep your goods in storage because you have no use for them right away." [75]

(Testimony of Marie Germann.)

I said, "I want my goods right away."

He said, "I can send them as soon as you want them." He did not send them as soon as I wanted them. It cost me a lot of money calling up on the phone. And finally the Red Ball brought the goods there.

Q. They were hauled to Seattle by the Red Ball? A. Yes.

Q. Is that a van and storage line?

A. Yes.

Q. Did he tell you at the time he was talking to you that he was working for the Red Ball Company?

A. No, he was for himself; that he had his own vans. He told us he had his own vans.

Q. I will ask you if this is the paper that he signed in your presence at the time you gave him the $50.00?

A. Yes, that's right. He specified $10.00 for insurance. When the goods came they claimed there was absolutely no insurance on our goods whatsoever.

Q. Did you see him sign it there?

A. Yes. He signed it and then he told me he did not know why he signed it but he did. There is a letter there regarding the $50.00.

The Clerk: Government's Exhibit 9 for identification.

Mr. Champlin: I forgot to mention that this witness is testifying in connection with Count IX of the indictment. [76]

(Testimony of Marie Germann.)

I will offer in evidence Government's Exhibit 9 marked for identification. I now offer it in evidence.

The Clerk: Is it admitted, your Honor?

The Court: Yes.

The Clerk: Nine in evidence.

Q. By Mr. Champlin: The $50.00, do you have a receipt or any checks, or anything of that kind, as a receipt for the $50.00 you paid?

A. No, only the yellow paper; he put that on there. The Red Ball carrier did not want to give me credit for that $50.00 at all. I said, "You are going to give me credit for that," so he finally called up the transfer people, and we finally, I guess, got credit for it. I am not sure what we did get out of that $50.00.

Mr. Champlin: That is all. You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Mrs. Germann, when you called the defendant on the phone did you ask any questions of him as to whether or not he had any operating authority of his own?

A. He did not speak to me. I just called, and I talked to somebody there, and they said they would send him out. When he came I questioned him very closely. He did not say. He said he had his own vans. Definitely he told my husband and brother that; he said he had his own van lines.

(Testimony of Marie Germann.)

Q. Did you ask him whether or not he was operating as agent for another van line?

A. No, I did not, because he told us he had his vans, the Lincoln van.

Q. You mentioned a charge of $10.00.

A. That's right.

Q. For insurance? A. That's right.

Q. Do you have a copy of the freight bill that was given to you at destination in Seattle?

A. No, I don't. I believe the man gave it to me, but I think we lost it, but I believe it could be gotten very readily from the Red Ball line in Hollywood.

Q. Was the charge for $10.00 added onto your freight bill?

A. I don't know; I can't tell you. There was so much confusion at the time of it I don't know.

Mr. Champlin: Let the record show that we furnished the defendant's counsel with a copy of the freight bill he just asked the witness about, in this shipment. It is a photostatic copy and so authenticated.

By Mr. Wegener:

Q. Will you look at that photostatic copy? Do you recognize that as being a photostatic copy of the original? A. Yes, that certainly is.

Q. On the extension of these charges that appear in [78] the freight bill, is there a charge set out for any additional insurance, namely, the $10 you referred to?

(Testimony of Marie Germann.)

A. No. I questioned the carrier about that here. He said there was no additional insurance on her stuff at all.

Q. But likewise the charge for it does not appear in the freight bill?

A. No, it does not seem to appear here, no.

Q. The amount you paid the defendant, does that show as a deduction?

A. No, it shows $50.00.

Q. That was the amount you paid the Lincoln Transfer at Los Angeles?

A. That's the amount I paid to Cusack.

Q. In other words, it was taken off of the amount of the freight charges?

A. Yes, but the company did not get that.

Mr. Wegener: That is all.

Mr. Champlin: If the Court please, we would like to introduce into evidence this for identification.

The Clerk: Government's Exhibit 10 for identification.

Mr. Champlin: Inasmuch as counsel has shown it to the witness who has identified it, may we now offer it in evidence?

The Court: Yes.

The Clerk: Is it admitted in evidence, your Honor? [79]

The Court: Yes.

The Clerk: No. 10 in evidence.

Mr. Champlin: That is all.

MARIE KOCH,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Mrs. Marie Koch.

Mr. Champlin: If the Court please, this witness will testify concerning Count No. VIII.

Direct Examination

By Mr. Champlin:

Q. Where do you reside?

A. 9231, Loman Avenue, South Gate.

Q. That is in Los Angeles County?

A. Yes.

Q. Your occupation is that of a housewife, is that right? A. Yes, sir.

Q. Have you lived there very long, at that address? A. Since last August.

Q. 1947? A. Yes, sir.

Q. Where did you live in February, 1947?

A. At 3011 East Lawrence, Huntington Park.

Q. On or about February 21, 1947 did you see the defendant Clem J. Cusack?

A. It was July of 1946.

Q. What transpired at that time in connection with Mr. Cusack?

A. Well, we called him to get some information about having our furniture moved here.

Q. Where was your furniture at that time?

A. Covington.

(Testimony of Marie Koch.)

Q. What arrangements were made with Mr. Cusack concerning the movement of your furniture?

A. He was to pick it up in about a month. They got it on August 5th.

Q. 1947?

A. No, 1946. And we got it sometime the latter part of September.

Q. 1946? A. Yes, sir.

Q. Did you pay Mr. Cusack any money at the time you made the arrangement or agreement?

A. Yes, sir, $85.00.

Q. Did he sign any contract, any papers or agreement at the time? A. Yes, sir.

Q. Did he sign anything in your presence, that is, Mr. [81] Cusack? A. Yes, sir.

Q. Did he deliver the goods according to the contract, or did you receive them from some other company?

A. We received it from the Richardson Transfer Company, Solina, Kansas.

Q. At the time you first contacted him did he state what his connection was with the Richardson Company, if any?

A. No, when we called the Lincoln Transfer Company we understood it would come through the Lincoln Transfer Company, not the Richardson.

Q. Did he say it would be some other line or carrier or did he indicate to you how it would be delivered?

(Testimony of Marie Koch.)

A. No, he said it was his own trucks that brought it through.

Q. What date was it that your furniture was received?

A. It was the latter part of September.

Q. September, 1946, is that it?

Q. At the time you made the contract there was nothing said as who would actually deliver it, is that right?

A. No, sir, we were under the impression that the Lincoln Transfer Company would pick it up.

Q. How did you happen to make the contract with Mr. Cusack and the Lincoln Company?

A. From the telephone directory. [82]

Q. Do you see an advertisement in this book that directed you to them?

A. Yes, sir, it was in the classified section.

Mr. Champlin: Cross examine.

Cross Examination

By Mr. Wegener:

Q. Did you state that your furniture was moved from Covington, Kentucky to California?

A. Yes, sir.

Q. Was the truck that delivered your shipment in Los Angeles, was it the Richardson Transfer & Storage Company? A. Yes.

Q. Did the driver have any difficulty at all when he arrived with your goods, to make delivery?

A. He did.

Q. Just what was the nature of the difficulty?

(Testimony of Marie Koch.)

A. They did not want to give us credit for the $85.00 and we couldn't contact Mr. Cusack. It took all day. Finally we got results from the Interstate Commerce Commission.

Q. What kind of results?

A. That evening Mr. Cusack sent us our money with a messenger, but we couldn't get him all day. Our furniture arrived that morning at 7:00 o'clock.

Q. That was $85.00 you spoke of which you had given [83] him previously? A. That's right.

Q. Then after the $85.00 was sent up there by a messenger, was the money given to you or was it given to the driver of the truck?

A. It was given to my sister.

Q. Then your sister used that $85.00 with other money to pay the Richardson driver the amount of the freight bill?

A. Yes. He wouldn't give us the furniture until we gave him the full amount.

Q. You mentioned before that when you talked with Mr. Cusack first you asked him if he was going to handle that in his own truck?

A. That's right, we wanted a through van. We did not want it handled twice.

Q. Did you ask him in particular as to the truck, whether it was going to be his own truck from Los Angeles or a truck from some other carrier, or something, that would come into Covington?

A. No, sir, he told us he had trucks that went through, took loads from here back there and would

(Testimony of Marie Koch.)

pick up our load and bring it out. That was the understanding.

Q. Did you arrange for the Richardson people to handle your shipment out here?

A. No, sir, I did not, I did not. [84]

Q. In other words, after you gave him the order the goods were delivered to you here in Los Angeles? A. Yes, sir.

Q. Do you have a copy of the papers that the Richardson driver gave you when the goods were delivered to you here? A. Yes, I have.

Q. May I see them, please? Are these the only papers the Richardson people gave you when they delivered the shipment to you?

A. Yes, they are the only papers I have.

Q. There is only a freight bill and a copy of a warehouse receipt. I thought you might have a copy of the bill of lading.

A. That is the bill of lading underneath.

Q. This is the freight bill.

A. There is the bill of lading.

Q. This is a warehouse receipt.

A. That is all I have, then. There is the weight.

Q. Was your shipment picked up and placed in storage anywhere in transit?

A. In Solina, Kansas, yes.

Q. Was it picked up at your request or did the carrier pick it up for your convenience?

A. It was picked up as soon as they got there with it. We did not know they were coming from Kansas then. [85]

(Testimony of Marie Koch.)

Q. In other words you thought, when the goods were loaded in Los Angeles they would come to you then? A. That's right.

Q. This states that they placed the goods in storage under your direction. A. No.

Q. The goods according to the warehouse receipt, no storage in transit was authorized by you in the movement of the goods? A. No, sir.

Q. Will you read the heading of the freight bill where it says: Richardson Transfer Storage Company, if you please.

A. Coast to coast van service. Richardson Transfer Storage Company. Coast to coast van service, 246 North 5th North 5th Street, Solina, Kansas, Post Office Box 329, Form No. 3.

Mr. Champlin: If the Court please, there was a correction to be made. This relates to Count V instead of Count VIII.

The Court: All right.

Redirect Examination

By Mr. Champlin:

Q. You were asked on cross examination, Mrs. Koch, about this $85.00 and some difficulty you had here as to the delivery after your furniture arrived, is that correct? [86]

A. That is correct.

Q. What transpired? Tell all the details that took place when the furniture actually got here.

A. They arrived with it at 7:00 o'clock in the morning. We thought they would take off the $85.00 which they had received.

(Testimony of Marie Koch.)

Q. You refer to the $85.00 you had paid to Mr. Cusack? A. That's right.

Q. Go ahead.

A. We tried to get in touch with Mr. Cusack so we could get the furniture unloaded. We couldn't get him, and they wouldn't let us have the furniture until we got the money.

Q. The $85.00?

A. Yes. That evening they sent it up with a messenger and they unloaded our furniture.

Q. Who sent the $85.00? Give us the details of what took place.

A. He sent it up with a colored man.

Q. You mean Mr. Cusack?

A. Mr. Cusack, to my sister.

Q. What is her name?

A. Mrs. Glen Rice.

Q. What time was that?

A. About 5:00 o'clock in the evening.

Q. The furniture arrived at 7:00 o'clock in the [87] morning?

A. In the morning, and stayed there all day.

Q. After this $85.00 arrived by the colored messenger, then what happened?

A. Then they unloaded our furniture.

Q. By "they", you mean the Richardson Van Company?

A. The Richardson Van Company unloaded our furniture then.

Q. The original contract you signed, I will ask you if this is the paper that you received at the time you paid the $85.00 in the first place?

(Testimony of Marie Koch.)

A. Yes, sir.

Q. Does Mr. Cusack's signature appear thereon anywhere? A. Yes, sir, here and here.

Mr. Champlin: Let the record show that the witness has indicated two places. I would like to have this marked for identification as Government's exhibit.

The Clerk: Government's Exhibit 11 for identification.

Mr. Champlin: I now offer in evidence the Government's Exhibit No. 11, having been previously marked for identification.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

The Clerk: Government's Exhibit 11 in evidence

Mr. Champlin: That is all. [88]

Recross Examination

By Mr. Wegener:

Q. Do you know whether or not your sister or someone in Covington, Kentucky—do you know of your own knowledge whether or not they placed any order with another van line back East?

A. No, sir, they did not. No one had anything to do with it except me.

Q. No one had anything to do with placing the order but you? A. No, sir.

Mr. Wegener: That is all.

BERTHA JOHNSTON,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Bertha Johnston.

Direct Examination

By Mr. Champlin:

Q. If the Court please, this testimony relates to Count No. VIII.

Where do you live, Mrs. Johnston?

A. 310 West Broadway.

Q. Whereabouts is that?

A. In Long Beach. [89]

Q. How long have you lived there?

A. About two years and a half, I guess, or three.

Q. Your occupation is that of a housewife, is that right? A. I am alone and I keep house.

Q. Did you live there on February 21, 1947?

A. Yes, sir.

Q. Did you have occasion to see the defendant Cusack at that time? A. How is that?

Q. On or about February 21st, 1947, did you have occasion to see Mr. Cusack?

A. That is the day that I made the transaction with Mr. Cusack.

Q. What was that transaction? Tell the jury.

A. I paid him $50.00 to bring the furniture of my daughter's from Hibbing, Minnesota, and he phoned to her after we had had our talk and made

(Testimony of Bertha Johnston.)

arrangements and told me that they would get the furniture either the 28th of February, or the following day, and he told my daughter to say it would be not later than March 10th that the furniture would be in Long Beach.

Q. Did he deliver the furniture in Long Beach as agreed?

A. No. We waited and waited and finally I called him [90] to see what the trouble was and he said it was on account of the blockades of the snow, that they could not get through.

Q. Who told you that, that the road was blockaded by snow? Did Mr. Cusack tell you that?

A. What?

Q. That they were blockaded by snow. Who told you that? A. He did.

Q. Do you mean Mr. Cusack?

A. Yes. Then a few days later—no, it was several days later I called up again to see what the trouble was and he said, "They tell me the roads are good; that has nothing to do with the roads." He says, "It is the company back there."

Q. Did he ever deliver your furniture to you?

A. No.

Q. Who delivered it, if anyone?

A. It was a man in Hibbing, but it put my daughter back like everything, because she had given up her apartment, and the boss or owner rented it for a lot more, and she had to pay whatever it cost during that time; it was plenty.

Q. At the time you first talked to Mr. Cusack

(Testimony of Bertha Johnston.)

did you pay him any money as a part of the agreement?

A. I gave him a $50.00 check, and I have the check here.

Mr. Champlin: (To the Clerk): Will you mark this for [91] identification, No. 12, I believe.

The Clerk: Government's Exhibit 12 for identification.

Mr. Champlin: I would like to offer in evidence No. 12 previously marked for identification as Government's Exhibit 12.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Twelve in evidence.

Q. By Mr. Champlin: You testified Mr. Cusack failed to deliver your furniture? Did you ever receive a refund for the check you gave him?

A. I finally did. He sent me a check, but it came back no funds. I sent it in again, and it came back, no funds. Then I took it up with the Better Business Bureau, and the bank, and they advised me to write a letter, which I did, and he sent me the money.

Q. Did you sign any contract or paper at the time you say Mr. Cusack signed the paper, at the time of the original agreement?

A. I think I signed the paper he made out. I couldn't just find it. Maybe when the fellow came I gave it to the F.B.I. man. I don't remember, but it was just a plain slip of paper.

Q. You don't have any evidence of a contract?

(Testimony of Bertha Johnston.)

A. No, I have not. The only thing I have is a paper. [92] The F.B.I. came out and talked to me, and he saw the check returned that was no good. I suppose I have a copy of that too.

Mr. Champlin: That is all. You may cross examine.

Cross Examination

By Mr. Wegener:

Q. Do I understand you properly that you placed an order with Mr. Cusack and then later cancelled the order with him?

A. Yes, because he did not bring my goods. He did not keep his word.

Q. Then you wrote your daughter, and someone else placed the order with some other company?

A. Yes. It cost her three or four times that amount, paying for that after giving up her apartment, and he kept stalling and promising he would get it.

Q. Do you remember who your daughter had, or whoever it was, pick up the furniture?

A. It was a man in Hibbing.

Q. Do you have any copy of any papers of the shipment?

A. No, she kept all the copies of this. She was living in Long Beach.

Q. Was the check, that is, the money which you paid the defendant, that was eventually returned to you? [93]

A. He paid me back, which was before we ever made any deal with the other fellow.

(Testimony of Bertha Johnston.)

Mr. Wegener: That is all.

Mr. Champlin: No further questions, your Honor. I would like to call one more witness.

CHARLES LESTER,

a witness called by and on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Charles Lester.

Direct Examination

By Mr. Champlin:

Q. What is your occupation, Mr. Lester?

A. I own the Belmont Van & Storage Company, Long Beach.

Q. You live in Long Beach, do you?

A. That is correct.

Q. Did you have occasion to have a transaction with Mr. Cusack in connection with removing some furniture? A. I did.

Q. What date was that, approximately?

A. It was five incidents, starting, I believe, June 13th, and ending June 29th, 1946.

Q. What arrangements did you have with Mr. Cusack—your company, what arrangements did you have so far as the [94] delivery of the goods was concerned?

A. None whatsoever. It wasn't in connection with interstate commerce. I mean by that for transportation in interstate commerce. It was simply a

(Testimony of Charles Lester.)

local hauling and storage we thought we were getting into.

Mr. Champlin: If the Court please, this testimony relates to Count X of the information.

Q. Did your company have anything to do, on or about June 22nd, 1946, in connection with the delivery of goods for Mr. Paul Reese, from Long Beach, California, to Belgrade, Montana?

A. It was June 22nd that we picked up the goods, on telephone instructions from Mr. Cusack, that he had made his own arrangements, and the truck simply wasn't available; that the customer had to have his goods picked up on this specific date, and it was specifically understood it was a local cartage to my warehouse and storage.

Q. How long were the goods kept in your storehouse before they were subsequently moved to Montana?

A. They picked them up at my warehouse on September 14th.

Q. They were stored there between June 22nd and September 14th? A. That is correct.

Q. Do you know anything about the transaction directly, [95] as to what company moved them from your warehouse to Montana? A. Yes.

Q. What company was that?

A. The United Van Lines.

Q. Does your company have any business relationship, direct business relationship with the United Van Lines? A. Yes, we are an agent.

(Testimony of Charles Lester.)

Q. Was Mr. Cusack an agent for you, or anything of that kind? A. He was not.

Q. Did your company give him authority to make contracts, or make any transactions that would relate to you or the United Van Lines, to your knowledge? A. Absolutely none.

Q. If you know, do you know whether or not Mr. Cusack was a representative of the United Van Lines, or that he had any authority to act for them as your principal? A. No, he does not.

Q. You do know of your own knowledge that he does not?

A. There are only two agents in the area. That is the main office of the United Van Lines in Los Angeles and myself in Long Beach. Since that time I believe there were three other agents in Los Angeles, but Mr. Cusack was not one of them.

Q. Did Mr. Cusack make any arrangements with you to [96] pick this furniture up and move it to your warehouse on or about the 22nd of June?

A. He called me on the telephone.

Q. What was your conversation? What did he say and what did you say at that time, going back, I believe, to the 13th, the first of the five conversations?

A. He called me, and I did not know him. I do know several Lincoln Transfers. I did not know who he was, but it is customary for the transfer people to work together if we can. He called me and asked me about picking the goods up. I told him what the situation was, that it was strictly

(Testimony of Charles Lester.)

local; and that same attitude prevailed through the five conversations. At the end of that time it became quite evident that things weren't working out the way they should, and we conveniently had no time to pick up any further shipments. There were one or two more conversations.

Q. Did your company happen to have authority in interstate commerce to move in interstate commerce?

A. Not the Belmont Van & Storage.

Q. As agent for the United Van & Storage, you can make contracts within your authority for them? A. That's right.

Q. But in this case, as I understand your testimony, you made the arrangements to have this furniture picked up for one Paul Reese, and stored it in your warehouse. Do you know how it happened to be moved by the United Van Lines? [97]

A. Yes, I do.

Q. What is the story on that?

A. This Paul Reese shipment was the last they unloaded from the warehouse. On the others I believe there was some little difficulty of getting our charges. This particular one was supposed to be received on August 9th. I talked to Mr. Cusack on August 8th, and there was a balance of $38.00, I believe, due for our storage and hauling charge. I told him we would have to have the money before we could release it. He promised me that the money would be there in cash with the driver the next morning. The driver showed up with no money, so I called

(Testimony of Charles Lester.)

Mr. Cusack and told him what the situation was. He sent a Western Union money order for $38.00. The driver was somewhat disgruntled about what happened and he left, but he did receive the money. The driver was gone and the people were calling the local representative. I was very anxious to get the whole thing off my neck, so I talked with Mr. Cusack and I have a letter of authority, which says to make arrangements to forward it by United Van Lines; and I completed the papers with the charges, and sent them to Mr. Cusack, with the letter and requested that a copy be signed and returned to us. It was listed as the Lincoln Transfer, as shipper. That was the way it was signed.

Q. You don't happen to have the letter?

A. I have the letter in Mr. Cusack's writing [98] authorizing us to make the arrangements, and I have the order and I believe that you have a copy of our letter to Mr. Cusack.

Mr. Champlin: May we have this marked for identification. If you need that for your official records, we can request the Court to release that at some later time.

The Court: All right.

A. This is our letter to him.

The Clerk: That is Government's Exhibit 13 marked for identification.

Mr. Champlin: I offer Government's Exhibit No. 13 for identification into evidence.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

(Testimony of **Charles Lester.**)

The Clerk: Thirteen in evidence.

Q. By Mr. Champlin: Mr. Lester, do you know of your own personal knowledge how much Mr. Cusack got out of this transaction in the way of a commission or fee?

A. He only collected $50.00. It was credited to him.

Q. He was credited by your company or credited by the United Van Lines? How was that done?

A. One or the other. He had collected the $50.00 and we showed the charges for the pickup and storage. On the order they credited that back, the $50.00 that we knew Mr. Cusack had collected, and he paid us our advance charges. So actually he paid out $38.00 and sent it to us for these [99] charges. He had collected $50.00.

Q. You don't know who he collected the $50.00 from, do you? A. No, I don't.

Q. That was the Paul Reese shipment—you know that to be a fact? A. Yes, that's right.

Mr. Champlin: You may cross examine.

Cross Examination

By Mr. Wegener:

Q. I will show you what is called an Order for Services. Will you look at that, please? Did you make up that Order for Services? A. I did.

Q. Was that Order for Services made up after the goods were brought into your warehouse at Long Beach? A. That's right.

Q. In discussing the facts and figures that are on this Order for Services, up in this corner what

(Testimony of Charles Lester.)

does that state? Does it say: Agent Belmont Van & Storage Company? A. That is right.

Q. In the freight bill charges, does that show a charge to the customer for picking up and bringing it to your warehouse in the amount of $34.80?

A. That is correct.

Q. After all the charges were computed, the $50.00 which was paid to the Lincoln Transfer was deducted from the full amount of the freight bill, is that correct, and the shipment was signed for by Lincoln Transfer & Storage Company as shipper by Mr. Cusack as manager? A. That is correct.

Q. This letter that you wrote to Mr. Cusack, a copy of which is in evidence, refers to this Order for Services that you sent to him, is that correct?

A. That is correct.

Q. Would you read the first paragraph?

A. Enclosed is the original and two copies—

Mr. Champlin: If the Court please, does the Court allow the witness to read it into evidence?

The Court: No. Just call it to his attention and ask him the question.

Q. By Mr. Wegener: I call your attention to the first paragraph. Does the first paragraph there refer to the $50.00 that shows on your freight bill as a deposit made by the defendant?

A. No, the first paragraph refers to the charges to be collected from the customer and also the $50.00 made as a deposit.

Q. In other words, it refers to the deposit? [101]

A. It does refer to the deposit, yes.

(Testimony of Charles Lester.)

Q. You made a statement that the United Van Lines hauled this shipment from your warehouse at Long Beach to destination? A. Yes.

Q. You also stated that you were agent for the United Van Lines at that time, is that correct?

A. That is correct.

Q. You also stated that Mr. Cusack had no authority to book shipments through your authority as agent for the United Van Lines?

A. He had no authority to book shipments as an agent of the United Van Lines.

Q. As a subagent, through your agency?

A. He has no arrangement.

Q. Tell me this: When that shipment was delivered to destination, and the freight bill and bill of lading were sent to the United Van Lines home office, who was given credit for the booking commission accruing on that particular shipment?

A. I was.

Q. Did the United Van Lines charge your account with the $50.00 which showed as a prepayment? A. Yes.

Q. Did you and the defendant make any settlement as to that $50.00 that was on the freight bill?

A. He paid me the $38.00 advance charges. That brought [102] it down to the $11.00 figure.

Q. On this freight bill, what does the second line refer to, this charge here?

A. That was for the local hauling, on an hourly basis, to our warehouse, and the storage. I don't have the exact date on that, but it was from the

(Testimony of Charles Lester.)

date of picking up, which was January 22nd, to August 22nd, the local hauling.

Q. Who does it show that the money on the freight bill is due for that charge?

A. It shows it is due the Lincoln Transfer.

Q. It shows that money, $34.80, is due the Lincoln Transfer?

A. Yes, because the Lincoln Transfer paid me that money.

Q. On this Order for Services it shows the Lincoln Transfer & Storage Company as the shipper; it also shows less deposit paid to Lincoln Transfer & Storage Company as the amount of money that was collected by them. Can you reconcile the facts of those two—how they came to exist on this order?

A. Yes, I think so. It was the understanding that the Lincoln was acting as agent for the customer.

Q. How could he act as agent for the customer and yet take the $50.00 amount off the freight bill?

Mr. Champlin: I object to that as calling for a conclusion. [103]

The Court: That is argumentative and calls for the conclusion of the witness.

Q. By Mr. Wegener: Would you say he could be shipper and agent both?

Mr. Champlin: The same objection.

The Court: Objection sustained.

Q. By Mr. Wegener: Did the owner of the goods, Paul Reese—I believe he is the owner of

(Testimony of Charles Lester.)

the goods—did he in any way enter into any agreements or anything with you to have his shipment moved from your warehouse to destination?

A. He did not.

Q. In other words, he had no contract whatsoever with the owner of the goods?

A. That's right.

Q. And the goods were picked up from the residence to your warehouse under Mr. Cusack's instructions?

A. That is correct, and stored to the account of the Lincoln Transfer.

Q. When the goods went from the warehouse to destination you had to ship through the United Van Lines from your warehouse to destination?

A. That's right.

Q. You were paid a commission by the carrier for booking the shipment? [104]

A. That is right.

Q. The carrier in return charged you back with $50.00, you say, and that you had received the $50.00?

A. We had received the greater amount of it; all with the exception of $11.00.

Mr. Wegener: That is all.

Mr. Champlin: No further questions.

The Court: All right. Have you any further witnesses tomorrow, or have you rested?

Mr. Champlin: That is all, your Honor, for today. Do you wish me to call any further witnesses?

The Court: Are there any further witnesses for tomorrow?

Mr. Champlin: I don't believe so, except in rebuttal.

The Court: I want to know if you rest.

Mr. Champlin: We rest.

The Court: I will excuse the jury at the present time. I want to discuss the matter with counsel.

Ladies and gentlemen, I am about to excuse you until tomorrow morning at 10:00 o'clock. The Court admonishes you not to converse among yourselves or with anyone else on any subject connected with the trial or form or express an opinion thereon until the case is finally submitted to you. You may withdraw from the court room. When you come in, go up to the jury room and we will call you when we are ready.

Let the record show that the following proceedings were [105] had outside of the presence of the jury: I merely excused the jury so in case you desire to make any motion you may make it at the present time so we will not lose any time in the morning.

It is not our custom to send the jury out late in the afternoon, so I don't see any reason why the case should not go to the jury tomorrow afternoon. I have been working on the instructions. Being a newcomer you probably do not understand our custom here, especially mine. I have accumulated over a long period of years instructions covering practically every type of case, both civil and criminal. However, of course, counsel have the right to present and request further instructions and I will examine them, and if I see [illegible] I have not covered

I will have them rewritten on our own paper, so if they are sent to the jury they will not speculate as to the origin of the instructions.

The instructions are prepared without notes, or any indication by whom they are submitted. The instructions asked for by the Government, for instance, relate to the particular offense, and a definition of the offense on the part of the defendant, I will give any instructions relating to the particular defense which he has raised. The other instructions are general instructions relating to the doctrine of reasonable doubt, the presumption of innocence and the credibility of witnesses and the like, and they have been covered [106] by my own general instructions which have stood the tests of many, many appeals before the Circuit Court of this District, because I have tried criminal cases in five out of the seven States of this District, and in both Districts, Northern and Southern California.

We will stand adjourned until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Wednesday, April 21, 1948, at 10:00 o'clock a.m.)

Los Angeles, California, Wednesday, April 21, 1948, 10:00 a.m.

The Court: The cause on trial.

The Clerk: 19898 Criminal, the United States versus Clem J. Cusack.

The Court: Let the record show that the jury is in the box and the defendant is in Court with his counsel. Proceed.

Mr. Wegener: Your Honor, I move the Court to dismiss the charge—

The Court: Just a minute. I asked you yesterday if you were going to make a motion. That motion cannot be made in the presence of the jury.

Mr. Wegener: I understood counsel for the plaintiff had no further witnesses for yesterday.

The Court: No, he said he rested, and I excused the jury and I stated for the record— Let us read the record so there will be no misunderstanding.

(Record read by the reporter.)

The Court: They had rested and I asked you if you wanted to make a motion. However, I will let you make it now.

Ladies and gentlemen of the jury, you will be excused while counsel make the motion, with which you are not concerned. Will it be stipulated that the usual admonition has been given?

Mr. Champlin: Yes. [108]

Mr. Wegener: Yes, your Honor.

The Court: All right.

Mr. Wegener: May it please the Court, the defendant moves that Count No. II of the information be dismissed, inasmuch as no testimony was offered in support of that count.

The Court: I am sorry, but there is no longer a motion to dismiss. It is called a motion to acquit.

Mr. Wegener: Motion to acquit, your Honor. There is no testimony given in the case.

Mr. Champlin: If the Court please, the Government concurs in that motion. We will ask to make it ourselves, to acquit him on Count II. We will submit no instruction on that count.

The Court: The motion will be granted as to Count II.

Mr. Wegener: The defendant makes a motion on Count I for an acquittal, on the basis that no compensation was proved to have been received by the defendant. The testimony relating to the count shows that the money was received by the defendant as a prepayment of the freight charges on behalf of the carrier, and the carrier gave credit for the sums received by the defendant. There is no evidence offered by the plaintiff to the effect that the carrier who provided that transportation paid any compensation whatsoever to the defendant. It is admitted on the stand that the amount of money and also the receipt for the money given, which was [109] introduced in evidence, shows the amount as prepaid on the shipment, and if the Court please, the amount of money which the carrier duly accounts for, he is entitled to under the tariff charges. There is no testimony to the contrary, that the charges so collected were not his lawful tariff charges. That the acts of an agent or subagent, accruing under such act of transportation, must be proven by the carrier himself through testimony as to what he, as a carrier, paid to any person who might be unlawfully operating as a broker.

Your Honor as to Count I that will be all the motion.

The Court: The motion should be made as to all the counts. The answer to your argument is this: That is the count charged in the language of the statute; so it may be proved either by actual

receipt of the money or by arrangements by holding one's half out. That is the language of the statute. The Government has so pleaded, and you not having asked for a Bill of Particulars as to the matter which ties the Government down to what they are going to prove, the Government may prove either. Section 311(a) reads:

"No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions."

Then follows the exception so, in answer to your argument, under the federal practice an offense may be charged in the language of the statute, and where the section penalizes any one of several acts, the Government can allege all, and prove one, and that is how the indictment here is drawn.

Mr. Wegener: Your Honor, under the indictment or information there is no negation of the exception. In a case recently decided, United States of America vs. English, decided by the Circuit Court of Appeals of this Circuit, reported in 139 Federal 2d 885, decided January 7, 1944, the question was before the Court on a motion to quash, because the exceptions were not negatived in the information. The Court upheld in that case the mo-

tion to quash, because the exceptions of Section 306, Subdivision (a), Title 49 U. S. Code, are so much a part of the statute, the operating clause made it so much a part, and they were bound together with the offense defined, similar to the offense defined in Section 311(a) of the Act, that the essential ingredients of the prosecution cannot be adequately described without a negation of that in the information.

The Court: Section 306 is an entirely different thing. [110-A] That relates to a motor carrier, and to one operating who needs a certificate of convenience, and the same reasoning would not apply to a broker.

Mr. Wegener: A broker, under Section 311(a) is a person who for compensation sells or offers for sale transportation, subject to the Transportation Act, or holds himself out and receives compensation, who might represent two carriers in the same territory, receiving compensation for issuing the business of those carriers with similar authority in the same territory, and come under the purview of the brokerage section of the Act. However, any broker can be a bona fide agent of a carrier without filing under Section 311(a), which might put him under the purview of a broker. The Act says itself:

"And provided further, That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter to any bona fide employee or agent of such motor carrier, so far as concerns trans-

portation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or a common carrier by railroad, express, or water."

The Court: That is all right, but that is an exception, provides that certain persons engaged in certain transportation between June 1st, 1935 and October 1st, 1935, were [110-B] excluded. In other words, this Act was known as the Act of 1937, and only persons who were engaged in business at a certain time came within the Act. Therefore, the statute having provided for that, it was necessary to say as to persons who were not registered subsequent to that time. But this particular case has no time limit. It merely says anybody who is a broker, and who is engaged in interstate commerce, must have a license. Incidentally, if the reasoning of another court does not appeal to me, I am not bound to follow another District than my own. You understand that?

Mr. Wegener: Yes.

The Court: If it applied to this it would appeal to me, but it does not, to say that any person whose cause of action has arisen after January 1st must bring it within a year, from that date, or within a year after the effective date of the Act, which was August 2nd, 1946, because it creates a right as of a certain date. The complaint must allege that the right started within that period. That is in Section 306, but it is not true as to Section 311, because there is no exception stated. It does not say that a person engaged in the brokerage busi-

ness prior to that time shall be excepted. It merely says an employee employed, when? At the time they were soliciting. That is defensive matter; not a matter of substantive pleading, which the Government must plead in this case. And, furthermore, the proof here shows conclusively, [110-C] so far as a prima facie case can show, that this man at no time had a permit. And, furthermore, that he did not have any relation of agent or employee to the carrier who transported the goods. It may be well that the evidence will show to the contrary.

Mr. Wegener: The testimony further shows that the acts of the agent or subagent, in all counts before the Court—that the defendant was acting as an agent for various carriers, either through an express conversation or an agent's contract with them, or through an implied contract. The evidence shows that each of the carriers condoned the actions of the defendant by deducting the amount from the freight bill.

The Court: You can't ratify a criminal act by the mere fact that they said they felt in honor bound to deduct it in such cases. In two cases the goods had not been transported by him or anybody else, and the money was returned. This is not a civil action, and there is no such thing as a ratification of a criminal act by anybody but the Government. The mere fact that they accepted it did not make him their agent at the time. He was still operating without a license, and if they named him their agent at the time the difficulty arose they could not retroject it into the past in order to ren-

der valid his agency and legalize his act. That is not a ground for a verdict of acquittal in this case.

Mr. Wegener: Furthermore the testimony shows that the [110-D] transactions were handled principally through the Von Der Ahe Company of St. Louis. The Von Der Ahe Company of St. Louis is a carrier in its own right.

The Court: That is not the evidence. You can't refer to facts not in the record. The motion must be made on what the evidence shows.

Mr. Wegener: I believe the witness McGuigan testified in effect that he knew the Von Der Ahe people had that authority. Someone had authority.

The Court: I cannot go outside of the record. It is a question up to the jury as to whether he did it in one capacity or another.

Mr. Wegener: Those are all of the motions the defendant wishes to make at this time.

The Court: I understand your motion applies to all the other counts, on the same ground?

Mr. Wegener: Yes, your Honor.

The Court: The motion is granted as to No. II and denied as to the others. You may bring the jury down.

Let the record show that the defendant is in court with his counsel, and the jury in the box.

CLEM J. CUSACK,

the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your name, please?

The Witness: Clem J. Cusack.

Direct Examination

By Mr. Wegener:

Q. State to the Court your address.

A. 201 South Berendo.

Q. Mr. Cusack, on or about June 22nd, 1946, did you book a shipment for one Paul Reese, that is, contract to move goods from Long Beach, California, to Belgrade, Montana? A. Yes.

Q. Did you receive a deposit from the shipper in the amount of $50.00? A. Yes, sir.

Q. Would you explain to the Court the substance of this particular transaction that took place?

A. Well, these people called up in the nature of an inquiry asking for an estimate in moving up to Belgrade, Montana. I went out to their home, inspected their furniture, and gave an estimate and received $50.00 deposit and gave them a contract on it.

Q. Mr. Cusack, prior to this date, June 22nd, 1946, [110-F] were you engaged in local moving, as a salesman for any company, prior to that time?

A. Yes, sir.

Q. Will you give to the Court and jury the experience and background and so forth that you

(Testimony of Clem J. Cusack.)

may have had prior to that date in the moving industry.

A. I have been in the industry since 1936, and I have worked with various carriers in the major cities of the country. [111]

Q. Since 1936? A. Yes.

Q. In the companies beginning 1936, were you engaged both as an employee or as an agent? Just what was your relationship? A. Agent.

Q. As an agent of the carriers?

A. That's right.

Q. On this particular date, June 22nd, 1946, on the Paul Reese shipment—is that the date the contract was signed or is that the date the shipment moved?

A. The date the contract was signed.

Q. Approximately how long after that was the shipment moved, to the best of your recollection?

A. September, I would say.

Q. Before June 22nd, and after June 22nd—first let us answer the question before June 22nd, when the order was signed, had you talked with any one of the carriers authorized to serve the territory between the points of Los Angeles and the State of Montana? A. Yes.

Q. With whom did you talk? A. Ford.

Q. Where is Ford's domicile?

A. Twin Falls, Idaho. [112]

Q. Does Ford have a certificate to transport as a common carrier between those two points?

A. Yes, he does.

(Testimony of Clem J. Cusack.)

Q. And the shipment that is in question, to Paul Reese, you booked this shipment as an agent of the Ford Vans? A. Yes, sir.

Q. Were you his agent for any other carrier?

Mr. Champlin: I object to that, your Honor. The witness cannot testify legally as to the scope of his agency.

The Court: That's right. You may state the understanding you had. He cannot state whether he was the agent or not. That is a question of fact to be determined by the jury.

Q. By Mr. Wegener: Did you have any agreement with any other carrier that had the same authority between Los Angeles and Montana?

A. No, sir.

Mr. Champlin: Same objection, your Honor.

Mr. Wegener: I am asking him if he was the agent for any other carrier.

Mr. Champlin: It still calls for the conclusion of the witness.

The Court: He has answered that he had no agreement.

Q. By Mr. Wegener: Through the arrangement that you had with the Ford Van Lines, what authority did you have as to providing transportation services for Paul Reese in your [113] relationship with Ford?

A. I contacted Ford. He sent a truck down to the warehouse and loaded the furniture. There was some misunderstanding between the warehouse and the driver. The driver drove away without the furniture.

(Testimony of Clem J. Cusack.)

Q. Is that the misunderstanding that the witness Lester of the Belmont Storage, referred to in his testimony yesterday, of the driver getting disgusted and driving away? A. Yes.

Q. So the Ford Van Lines truck drove away from the Belmont warehouse? A. Yes.

Q. After the Ford Van Lines truck drove away from the warehouse, what part did you play in the handling of the shipment from that point? Did you have any further transactions with the customer relating to the movement of the household goods?

A. No, I did not have with the shipper. Mr. Lester said he would handle it through United, so I washed my hands of the whole thing.

Q. Mr. Lester handled it through the United, to the best of your knowledge, and demanded the return of the money from you?

A. That's right.

Q. How much money did you return to Mr. Lester? [114]

A. I believe it was in the neighborhood of $38.00.

Q. Had any charges accrued on that shipment, before the United Van Lines hauled the shipment from his warehouse to Montana?

A. Yes, that amount had accrued on it.

Q. Did you have any connection whatsoever with the United Van Lines in regard to that transportation? A. No, sir.

Mr. Wegener: If the Court please, I would like the record to show that the testimony as given is

(Testimony of Clem J. Cusack.)

as to Count X. I will make the witness available to counsel for the plaintiff on the count and will proceed to these various counts.

The Court: We do not start the cross examination until the matter is completed.

Mr. Wegener: I thought it would clarify the record to have the testimony as to each of the counts.

The Court: We don't do that. We never do that way.

Q. By Mr. Wegener: On or about February 26th, 1947 did you enter into any arrangement or contract to move a shipment of household goods from Long Beach, California to Seattle, Washington? A. Yes

Q. Was the shipper's name or party with whom you dealt Marie Germann? A. Yes. [115]

Q. You received a check from her in the amount of $50.00? A. Yes.

Q. Will you explain to the Court the transaction which took place on this particular shipment?

A. Mrs. Germann called the office for an estimate on moving up to Seattle. I went out and inspected the furniture and gave her an estimate, and gave her a contract, and collected $50.00.

Q. And the $50.00, to the best of your knowledge, was deducted from the freight bill at destination? A. Yes, it was.

Q. Had you had any conversation with anyone relating to the carriage of this particular shipment? A. At what time?

(Testimony of Clem J. Cusack.)

Q. At the time the shipment actually moved between this point and the State of Washington.

A. Yes.

Q. With whom?

A. With the Red Ball Moving & Storage at North Hollywood.

Q. Is that the Red Ball at Hollywood, California? A. North Hollywood.

Q. Is the Red Ball of Hollywood, a carrier in its own right, to the best of your knowledge? [116]

A. I believe they have rights in California only.

Q. Interstate or intrastate?

A. Inrastate.

Q. But nothing outside of the State of California? A. No.

Q. Does the Red Ball agency operate through any other carrier?

A. They are agents for the North American Van Lines in that territory.

Q. To the best of your knowledge does the North American have a license to operate between Los Angeles and the State of Washington?

A. They have.

Q. At the time this shipment was handled, on February 26, 1947, were you an agent, or did you have any relationship with any other carrier between Los Angeles and the State of Washington?

A. No, sir.

Q. You had no arrangement with any other carrier other than what arrangement you may have had with the Red Ball people?

(Testimony of Clem J. Cusack.)

A. That is right.

Q. On or about February 21, 1947 did you enter into any arrangement with a Mrs. Edmond O'Neil, to move household goods from Hibbing, Minnesota, to Long Beach, California? [117]

A. An arrangement was made with Mrs. Johnston.

Q. In other words, Mrs. Johnston acted on behalf of Mrs. O'Neil for this shipment?

A. That's right.

Q. In the handling of this shipment did you have any arrangement or any connection with any carrier to service this shipment? A. Yes, sir.

Q. With whom did you have such arrangement?

A. With Von Der Ahe, St. Louis.

Q. Is Von Der Ahe of St. Louis an agent of any other national carrier, to the best of your knowledge?

A. Yes, at that time I believe he was working on National permit.

Q. National who?

A. The National Van Lines.

Q. Is that a Chicago company? A. Yes.

Q. Is that the company Mr. McGuigan testified he was an officer of yesterday? A. Yes, sir.

Q. Tell the Court what was the arrangement with the Von Der Ahe people in St. Louis.

A. I was acting as their agent.

Q. How did you first contact the Von Der Ahe people? [118] A. By telephone.

Mr. Wegener: If the Court please, I would like to introduce that as Defendant's Exhibit 1.

(Testimony of Clem J. Cusack.)

The Clerk: Defendant's Exhibit A for identification.

Q. By Mr. Wegener: In your conversation with the Von Der Ahe people, will you relate the conversation which you had with them on the telephone?

A. Well, I would say in the middle of 1946 I talked with their drivers and with Mr. Von Der Ahe himself, as to acting as their agent here. In the meantime I booked some business, which I asked them to haul, but I said I would like to have something in writing that was legal before they loaded up the shipment, and he sent that telegram.

Mr. Champlin: I object. There is no evidence that the Von Der Ahe people shipped anything themselves. Therefore, any relationship with them is irrelevant and immaterial.

Mr. Wegener: It is quite material in the case. There is sufficient evidence from Mr. McGuigan's testimony of his own knowledge that the Von Der Ahe people had authority, and they were agents for the National Van Lines who also had a larger scope of operational authority.

The Court: The objection to the last question will be sustained. And the answer so far as it goes will be stricken out.

Q. By Mr. Wegener: In the furtherance of your business [119] do you ordinarily receive telephone calls? A. Yes.

Q. Do you ordinarily make telephone calls?

A. Yes, sir.

(Testimony of Clem J. Cusack.)

Q. The telephone is an important part of your business? A. Yes.

Q. Do you have many occasions to write letters and send and receive telegrams? A. Yes.

Q. Will you look at that telegram and state to the Court and jury just how you happened to come into possession of that telegram.

A. I have been in conversation with the Von Der Ahe people for several months prior to this date, which was December 17, 1946. He told me on the phone that I could book business for him in California—

Mr. Champlin: I object to that as hearsay—what they told him over the telephone.

A. Our arrangement was—

The Court: I will overrule the objection.

The Witness: Will you read the question back?

(Question read by the reporter.)

A. He would handle it and I could act as his agent. So before we loaded any of these shipments, we decided we should have something in writing to confirm our agreement. [120] Consequently on December 17, 1946, he sent me this wire giving me authority to be his agent in California.

Q. By Mr. Wegener: Would you read the contents of the wire to the Court, please?

A. The wire is to the Lincoln Transfer & Storage Co. Attention C. J. Cusack—

Mr. Champlin: I object to the witness reading this.

(Testimony of Clem J. Cusack.)

The Court: It may be offered in evidence and if counsel desires to read it he can do so when the witness is off the stand.

Mr. Wegener: The defendant moves that this be admitted in evidence.

Mr. Champlin: May I ask the witness just one question before we object, relating to the telegram?

The Court: You may ask the question.

Q. By Mr. Champlin: Will you state whether or not the National Van Lines moved this particular shipment or was it the Von Der Ahe people acting in their official capacity?

A. Which shipment?

Mr. Champlin: The shipment in question, the O'Neil shipment as to which counsel inquired.

Mr. Wegener: I object to that, your Honor. I think that the bill of lading on this particular shipment, the Von Der Ahe people—

The Court: Please don't comment on the evidence. You [121] have been arguing the case throughout the trial. The objection will be overruled. It may be received in evidence.

The Clerk: Defendant's Exhibit A in evidence.

Q. By Mr. Wegener: Mr. Cusack, during that period of time, in 1946, and the early part of 1947, to the best of your knowledge were there any restrictions or enlargements on the rights of carriers under the Defense Transportation, to the best of your knowledge?

A. There was some diversion of traffic act in effect at that time.

(Testimony of Clem J. Cusack.)

Q. Was that, to your knowledge, the war enlargement, or the portion that had to do with transportation during the war period? A. Yes.

Q. Will you explain to the Court and jury, to the best of your knowledge, what this governmental function, to the best of your knowledge, was at that time in its relationship to you?

Mr. Champlin: I object again as irrelevant and immaterial and going outside of the scope of this case. It calls for a conclusion on the part of the witness on the matter of a government regulation.

The Court: Read the question.

(Question read by the reporter.)

The objection will be sustained. That calls for a [122] conclusion. He can give the facts.

Q. By Mr. Wegener: Will you give to the Court the facts as to the relationship between carriers during that period of time?

A. If carriers had shipments they could not handle themselves, they could divert to another carrier in the same territory.

The Court: It is testimony as to what the Government allowed.

The Witness: It is a matter of record, I believe.

The Court: That can be stricken. This witness cannot testify to that.

Q. By Mr. Wegener: In your conversations with the Von Der Ahe people did you at any time ask them how they were going to transport, or cause to be transported, any of the shipments?

A. No, sir.

(Testimony of Clem J. Cusack.)

Q. In other words, to the best of your knowledge, the shipments that were handled through an arrangement made by you two—that is true, as to the Von Der Ahe people personally?

A. Yes.

Q. In the performance or handling of the business which you secured, the Von Der Ahe people had full control and jurisdiction over it? [123]

A. Yes.

Q. The shipment of Mrs. O'Neil's, the $50.00 which you received as a deposit, did you return that to Mrs. Johnston or Mrs. O'Neil in full after the Von Der Ahe people were unable to service this shipment?

A. Yes, Mrs. Johnston received the refund.

Q. Will you explain to the jury the transaction that resulted in the returning of this advance payment or prepayment?

A. According to the agent, due to weather conditions in Minnesota at that time, Von Der Ahe was unable to get a truck up there, so we had to cancel the order.

Q. Did this shipment drag out over a period of time that may have been unreasonably long so that the customer was incurring additional expense and so forth by virtue of her goods not being moved?

A. So she testified.

Mr. Champlin: Just a minute.

The Court: That is a conclusion.

By Mr. Wegener: Q. What were the facts which resulted in your returning the money? Give

(Testimony of Clem J. Cusack.)

the jury a complete story of it, other than weather conditions.

A. As I understood it, the person involved, Mrs. O'Neil of Minnesota, had to leave her home immediately up there, so she got a local company to call for her furniture. [124]

Q. How long was that period of time, between the time you made arrangements and her shipment was ready to move, and the shipment was canceled because you were unable to have it moved through the on Der Ahe people?

A. I would say about two weeks. I am not positive.

Q. You gave back the money in full to Mrs. O'Neil, or whatever party was handling the transaction?

A. To Mrs. Johnston.

Q. On or about October, 1946 did you enter into an agreement or arrangement with one Mrs. Francis Dambach, to move any household goods from Charleroi, Pennsylvania, to Los Angeles?

A. Yes, sir.

Q. Would you tell the Court who your arrangement was made with to have this shipment moved?

A. Von Der Ahe of St. Louis.

Q. Was this another of the transactions that was delayed, or that you gave the money deposited back, to the best of your knowledge, or was the shipment actually handled?

A. The shipment was handled by Von Der Ahe.

Q. The goods were picked up from Charleroi,

(Testimony of Clem J. Cusack.)

Pennsylvania by Von Der Ahe and brought to Los Angeles? A. Yes, Sir.

Q. The $20.00 which you received from Mrs. Dambach, as her agent at this end of the line, was the amount of money [125] finally accounted for, to the best of your knowledge, by whoever handled the shipment?

A. Yes, it was deducted from the freight bill.

Q. On May 21, 1946, did you enter into any arrangement with Ethel Holman, to move household goods from Chicago, Illinois to Long Beach, California? A. Yes, sir.

Q. Did you receive a deposit check in prepayment in the amount of $45.00? A. Yes, sir.

Q. To the best of your recollection, do you know what happened to that particular shipment?

A. I don't know what eventually happened. I know what my part would be.

Q. As to your part?

A. My part in this was that she wanted the furniture loaded in the next two or three days. I called Mr. Von Der Ahe, and I found that he could not load it in that length of time, and I returned the money to her.

Q. That was the $45.00 you received as the deposit? A. Yes, sir.

Q. So far as you know the transaction died at that point?

A. I eliminated my self there. I don't know who handled it. [126]

Q. On July 12, 1946 did you enter into any arrangement with one William H. Koch, to transfer

(Testimony of Clem J. Cusack.)

his household goods from Covington, Kentucky to Los Angeles?

A. The arrangement was made with her, because her sister, I think her name was Rice,—Mrs. Koch was in Covington at the time.

Q. Mrs. Rice was on your end of the line?

A. Yes.

Q. Will you tell the Court and jury the facts concerning that particular transaction?

A. Mrs. Rice called us for an estimate. I went out and made the estimate and collected the deposit and sent the information to on Der Ahe. In the meantime Mrs. Rice's sister in Covington apparently contacted another moving company, that picked up the furniture. I collected the $85.00 as a prepayment, and when the other company brought it in they wouldn't deliver it until they had the $85.00. I refunded the $85.00.

Q. You say to the best of your knowledge another moving company at the other end of the line was apparently given that business by someone else? Yes, sir.

Q. Do you know who that company may have been?

A. Richardson, I understand.

Q. In other words, the actual transaction of the [127] movement, when it was consummated, you had no part, through any agency arrangement or otherwise, to handle that shipment?

A. No, sir.

Q. Was that the reason why they demanded of you the $85.00?

(Testimony of Clem J. Cusack.)

A. Yes, sir, because I had no agreement with Richardson whatsoever.

Q. Did you have any conversation with one Marvin Young, to move his goods from Cedar Rapids, Iowa to Gardena, California?

A. Mrs. Young; not Mr. Young.

Q. Did you receive a deposit from Mrs. Young at the time you made an estimate?

A. Yes.

Q. To the best of your knowledge and memory, do you recall the facts that surrounded that particular order?

A. Yes, I do. Mrs. Young called up for an estimate. I made an estimate and received a deposit and about two or three days later she called and said she could not receive her furniture at the time because her house was not ready for it. About three or four months later she called the office again and said they were ready now to receive the furniture I contacted Mr. Von Der Ahe's agent. At that particular time they did not have a van in Iowa, and it was very important for them that they get another company and I refunded the [128] $50.00 to Mrs. Young.

Q. You refunded the full amount that you had received prior to that time? A. Yes.

Q. According to your testimony thus far, you have stated several shipments that were received from points in Pennsylvania, in Covington and Chicago, which came out to the State of California. To the best of your knowledge do you know why

(Testimony of Clem J. Cusack.)

such a condition would exist to delay the service?

Mr. Champlain: I object to that as calling for the conclusion of the witness, your Honor.

The Court: Yes. Objection sustained.

By Mr. Wegener: Q. In your conversation with on Der Ahe did he give you any reason for not being able to load the furniture on schedule?

Mr. Champlain: That would be hearsay, your Honor. I object to it.

The Court: Overruled.

A. The shipments were very small, to begin with, and unless the shipper was engaged to the full capacity of the van it wouldn't be good business to send the van up there for such a small quantity of furniture, in these out-of-the-way places.

Q. Were there any other ramifications to the shipments besides being small? [129]

A. Which particular ones?

Q. All of them you have mentioned up to this time, from Pennsylvania, Covington, and Chicago.

A. In Pennsylvania, there was no delay on that.

Q. Did the Von Der Ahe people express any reason to you for not being able to load them, other than the shipments being small?

A. They did not have a van in that territory.

Q. Were they exceptionally busy on westbound tonnage?

A. At that time very busy.

Q. Do you know what the situation was at that particular time relating to westbound tonnage?

(Testimony of Clem J. Cusack.)

A. The ratio was about one to ten; ten coming out, and one going in, with the other companies.

Q. By other companies you mean, to the best of your knowledge, other companies who serviced the shipments coming in here?

A. Yes, sir.

Q. Did you have any conversation with any other carrier during this particular time relating to the movement of their tonnage coming to the West Coast?

Mr. Champlin: I object to that as incompetent and immaterial in this case. Besides, it is hearsay.

The Court: Read the question.

(Question read by the reporter.) [130]

The Court: We are not interested with anyone, unless it is shown that some of the shipments were routed or he tried to route them through others.

Mr. Wegener: That is the point.

The Witness: Yes, in the ordinary course of business I contacted many traffic men.

By Mr. Wegener: Q. When you say traffic men do you mean representatives of other carriers?

A. Dispatchers of other carriers.

Q. To the best of your knowledge the situation as to the westbound tonnage was quite acute at that time?

A. Very acute.

Q. On or about September 4, 1946, did you talk to one Louis Nault about a shipment moving from Fremont, Nebraska, to Long Beach, California?

A. Yes, I did.

(Testimony of Clem J. Cusack.)

Q. Did you receive a deposit either from Mr. Nault or his agent or representative at the time?

A. From Mr. Nault.

Q. From Mr. Nault himself?

A. That's right.

Q. To the best of your memory do you know who actually loaded and delivered that particular shipment?

A. Von Der Ahe of St. Louis.

Q. Was that the result of any communication that you [131] had with Mr. Von Der Ahe?

A. Yes.

Q. Did you have any conversation with Mr. or Mrs. J. H. Oliver as to the movement from Los Angeles to San Antonio, Texas, or household goods?

A. I did.

Q. Did you receive a deposit of money from that shipment? A. Yes.

Q. Was that deposit of money credited to the shipper on the freight bill?

A. It was deducted from the freight bill.

Q. Who handled that particular shipment?

A. Von Der Ahe.

Q. Was the result of your conversation between you and the Von Der Ahe people in relation to this?

A. The result of our agreement.

Q. In your conversation with the Von Der Ahe people did the Von Der Ahe people at any time inform you as to the scope of their own individual operating authority? A. Yes.

(Testimony of Clem J. Cusack.)

Q. To the best of your knowledge do you remember what the scope of their authority was?

A. I believe they have the States east of Missouri, with the exception probably of Maine and Vermont.

Q. The States west of Missouri, so far as you knew, [132] they were operating through either their own, or arrangements with other carriers?

A. That is right.

Q. In all your transactions with these people who were interested in having shipments moved from one point to another, did you at any time have any idea that you might be bound by many laws relating to interstate commerce?

A. Certainly.

Q. To your knowledge did you know that you might be breaking some of those laws?

A. No, sir.

The Court: Just a moment.

Mr. Wegener: Strike that.

The Court: The objection will be sustained. The answer will be stricken. A man is supposed to know the law. The jury will disregard the answer. An objection was not made.

By Mr. Wegener: Q. Were you ever advised by any one of the company's agents that had jurisdiction over this type of movement to the effect that if you did certain things that you might be required to file for a brokerage certificate?

Mr. Champlin: I object to that. It is leading if nothing else.

(Testimony of Clem J. Cusack.)

The Court: It is not the duty of any government agency to inform anyone whether he is violating the law. If anyone wants to engage in business relating to interstate commerce, [133] he is supposed to know what is required. It is not material in this case.

Mr. Wegener: I was only—

The Court: I have ruled. Please proceed.

Mr. Wegener: That will be all.

The Court: Incidentally, ladies and gentlemen of the jury, I forgot to inform you that during the discussions with counsel and Court, the Court has dismissed Count II of the information. That was the count relating to Mrs. Hepner; so the only counts remaining before the jury are Counts I and Counts III to X inclusive. Proceed.

Cross Examination

By Mr. Champlin:

Q. Mr. Cusack, are you familiar with the tariff of the interstate carriers? I will show you the particular section pertaining to the Von Der Ahe people. You were asked on direct examination as to whether you knew what their scope of authority was for interstate transportation. I believe your answer was that they operated on the Eastern seaboard and certain points in the Middle West. Does that tariff relating to the on Der Ahe people state what your understanding of what their authority was?

A. Yes. I did not state a definite point. I said I believed they had everything west of Missouri.

(Testimony of Clem J. Cusack.)

Q. To your knowledge do they have any operation on the West Coast?

A. Not to my knowledge.

Q. Isn't it true that they are unable with their equipment to come into this territory? In all of these shipments, two in particular, didn't they move under the National Van Lines authority?

A. I believe they did.

Mr. Wegener: I object. The tariff speaks for itself.

The Court: Objection overruled. Your examination has taken a wide scope and I will allow the Government a wide scope.

By Mr. Champlin: Q. Did you say, Mr. Cusack, that you were familiar with this tariff?

A. Yes.

Q. Is this your understanding of their scope, this section that deals with the Von Der Ahe people's authority under the I.C.C.? Is that your understanding of their operation? A. Yes.

Mr. Champlin: I would like to have this marked as an exhibit for identification.

The Clerk: Government's Exhibit 14 for identification.

Mr. Champlin: The Government at this time offers in evidence page 54 of the participating carriers territorial [135] directory insofar as it pertains to the Von Der Ahe Moving Company. This is page 54, Section 3160.

The Clerk: It this admitted, your Honor?

The Court: It may be received.

(Testimony of Clem J. Cusack.)

The Clerk: 14 in evidence.

Q. Mr. Champlin: Mr. Cusack, in this transaction in which there was a delay as to which you did refund the money to the people, isn't it true that that was refunded after these people had contacted the Better Business Bureau, the I.C.C., the Sheriff's office, or some other Government agency?

Mr. Wegener: That is objected to, your Honor. The testimony is clear, and it would be irrelevant.

The Court: Objection overruled. He may be asked so long as the testimony goes to good faith.

A. I don't know what they did, sir. All I know is I refunded the money.

By Mr. Champlin: Q. Isn't it true that before such refund was made you were contacted by either the I.C.C., the Better Business Bureau, or some Government agency?

A. I couldn't say that is true, no, in every case.

Q. On this shipment to Paul Reese, Montana, do you recall the incident of the Belmont Company charging you $38.00 for the storage of that particular shipment? A. Yes. [163]

Q. Then actually you received some $11.00 that you were able to retain on it, is that correct?

A. Yes.

Q. In all of these transactions to which you testified on direct examination that you did receive the money, isn't it true that you gave the shipper a contract at the same time agreeing to certain terms relating to the shipment of the goods?

A. That's right.

(Testimony of Clem J. Cusack.)

Q. You signed the contract in each case, is that right? A. Yes.

Q. Isn't it true also that you have advertised in the local papers, the Los Angeles Times, the Los Angeles Examiner, and also the telephone directories?

A. That's right.

Q. And you are known as the Lincoln Transfer & Storage Company?

A. That's right.

Q. Do you have any trucks of your own, Mr. Cusack? A. No.

Q. You don't actually do any hauling then in interstate commerce whatsoever?

A. No, sir. I don't set myself up for that.

Q. Do you have any authority from the Interstate Commerce Commission to do any hauling?

A. I don't need it for my type of business.

Q. You don't have a broker's license?

A. I don't need it for what I do.

Q. You don't have a license or permit from the Interstate Commerce Commission as a motor carrier?

A. I don't need it for my business.

Q. In response to ads in the newspapers in these transactions, you have gone to people's homes and discussed the matter with them, is that correct?

A. Yes, sir.

Q. Have you represented to them that you would haul their shipments, such as the Pennsylvania shipment which was hauled on the Von Der Ahe

(Testimony of Clem J. Cusack.)

trucks to Los Angeles? Did you tell the shipper who would actually haul their equipment?

A. In that particular case I can't answer yes or no because I don't recall.

Q. Did you actually know at that time?

A. Certainly.

Q. You knew the Von Der Ahe people would haul it? A. Yes, sir.

Q. And the Minnesota shipment, did you know the Von Der Ahe people would haul that particular shipment? A. Yes.

Q. As a matter of fact there was some delay, and some other carrier transported to this area?

A. Yes, she gave it to some other carrier. Who I don't know. The delay was due to weather conditions.

Q. In the matter of the transportation of goods from Los Angeles to Washington, Seattle, Washington, by the North American Lines, you did not have any agreement with them to haul, did you, at the time?

A. I had an agreement with the Red Ball.

Q. Of your own knowledge, I believe you stated that the Red Ball, has no interstate authority, and can transact business in California alone; is that right? A. Yes.

Q. So far as you know the Red Ball was the agent for the North American?

A. That's right.

(Testimony of Clem J. Cusack.)

Q. Therefore you had no arrangement or agreement with North American, in the capacity of subagent, or anything to that effect?

A. No, sir.

Q. In the matter of the Montana shipment, between Los Angeles and Belgrade, Montana, that was hauled by the United Van Company, is that right?

A. That's right.

Q. You did not have any arrangement with them directly, did you at the time of the contract?

A. No. [139]

Q. Isn't it true that the Belmont Storage Company arranged that shipment up there?

A. That's right.

Q. With your knowledge, and you arranged to pay them certain storage fees, and also retained some money yourself, is that right? A. Yes.

Q. As a matter of fact, in all of these transactions you testified that the freight bill credited the shipper with the money that you received?

A. Yes, it was deducted from it.

Q. In each case, however, you got a commission back on each one of the shipments? A. Yes.

Q. Did you get a commission yourself?

A. Yes.

Q. You used that commission to pay telephone bills, office expenses and so forth? A. Yes.

Q. As a matter of fact you did have an office in Los Angeles? A. Yes.

Q. Is that in your home?

(Testimony of Clem J. Cusack.)

A. No, it is at 601 South Vermont.

Q. The telephone number is Drexel 5297? [140]

A. Yes.

Q. About what percentage did you receive? Is there a standing arrangement with the Von Der Ahe people that you would receive a certain percentage? A. That's right.

Q. What was the percentage you received?

A. Twenty.

Q. Is that 20 per cent of the complete freight cost or 20 per cent of the money you received at the time the contract was signed?

A. No, 20 per cent of the money received on the shipment.

Q. In other words, you kept $20.00 on each $100 of the complete freight cost?

A. That is right.

Mr. Champlin: That is all.

Mr. Wegener: The defendant rests his case.

The Court: Any rebuttal?

Mr. Champlin: No rebuttal, your Honor.

The Court: Ladies and gentlemen, we are about to take a recess until 1:30. You will be excused until 1:30. The Court admonishes you not to converse among yourselves or with anyone on any subject connected with the case or to form or express an opinion thereon until the case is finally submitted to you. You may withdraw from the court room. But [141] there is a matter I will take up with counsel.

Gentlemen, under the rule, the Court is required to inform counsel before the argument of the Court's action upon counsel's requested instructions. As I have observed on many occasions, the object of the law can only be to give counsel greater freedom in commenting upon the facts, because they are then in a position to know with greater freedom than existed before, what the Court's instructions in a general way would be.

Let the record show that the defendant has offered no instructions at all. The Government has offered some instructions, but Mr. Champlin, you haven't numbered those instructions, which makes it difficult to refer to them. However, I will state—you have a copy of the instructions, have you not?

Mr. Champlin: They are supposed to have them. I have one copy.

The Court: You had better hand it to counsel so he will know. First of all I will state that I give general instructions as to the quantum of proof, the meaning of reasonable doubt, — instructions which have been approved by the higher courts. I will number them here. The first one is "The Government is required to prove,"—have you got them in that order?

Mr. Champlin: Yes, your Honor. [142]

The Court: I am not giving 1 or 2 because they are covered by the other instruction.

I am giving 3, which is merely a statement that transportation is commerce.

I am giving 4 as a general statement of the charge.

I am not giving 5 because I have a better def-

from the famous case of Murdock v. United States, 292 U. S., which has been given for many years.

I am giving another which is the definition of a broker. I am not giving these in the order in which they appear. I am rearranging them so there will be continuity.

I am giving 7, which merely gives a portion of the Act. However, I am changing the end of it. It will read as follows, beginning with line 22: "you must find the defendant guilty as charged in such count of the information, as to which you find the facts to be true beyond a reasonable doubt." In other words, that is an omnibus instruction and I have modified it accordingly.

In addition to that, although the defendant has not offered any instructions, I am giving an instruction to this effect: The statute under which this prosecution was instituted also provides—then I read the proviso. That is the exception. Then I continue: "The defendant claims that he acted in the capacity of agent or [143] broker for a motor carrier, having a certificate of convenience and necessity. If you find that he did so act, or if the evidence raises a reasonable doubt as to whether he did so act, you must acquit the defendant."

I have also modified No. 7 on line 17, after "compensation." I have added the words "and without a broker's license." In other words, while I don't agree with your theory that it must be charged that way or that the Government must prove the exception, in instructing the jury I take into consideration the exception, because they must decide

from the entire evidence whether there was a violation, and if the man comes within the exception there is no violation.

I think, gentlemen, that has given you all the information about the instructions. The general instructions I have already outlined to you. I have made the instructions very simple, because as I see the issue, it is very simple.

How much time do you desire for argument?

Mr. Champlin: Twenty minutes, approximately that, or a half an hour.

Mr. Wegener: I would say that would be approximately it.

The Court: I will allow you a half an hour each, if you need that much time. That will mean that we can send the jury out a little after 2:30, which is ample time to give them an opportunity to dispose of the matter before the end of the day. [144]

Mr. Champlin: There is one request, your Honor. May we have the last clause of the defendant's instruction read again concerning being an agent?

The Court: I merely said this: — I merely changed each count and have given the instruction as follows: "you must find the defendant guilty as charged in such count of the information, as to which you find the facts to be true beyond a reasonable doubt." In other words, while it is true that the same law applies to all, nevertheless a jury are not required to be consistent. They might find the defendant guilty of one count and not guilty as to the others, and they should be given that opportunity.

Mr. Champlin: The Court misunderstood. I mean the instruction you will give for the defendant since he did not have a written copy.

The Court: I will read it in its entirety. You can have it transcribed if you want it. It will be the last instruction and reads:

"The statute under which this prosecution was instituted also provides:

'That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such [145] carrier, or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express or water.'

"The defendant claims that he acted in the capacity of agent or broker for a carrier having a certificate of convenience and necessity.

"If you find that he did so act, or if the evidence raises a reasonable doubt as to whether he did so act, you must acquit the defendant."

(Whereupon an adjournment was taken until 1:30 o'clock p.m. of the same day.) [146]

Los Angeles, California, Wednesday,
April 21, 1948, 1:30 p.m.

The Court: Let the record show that the jury is in the box and the defendant is in court with his counsel. Proceed.

(Arguments.)

The Court: Ladies and gentlemen of the jury, the Court will now give you instructions on the

law which are to govern you in your deliberations. All the instructions except the general instructions at the end, are in writing, and I shall read them as written with such modifications as may occur to me as I read them. If, after you begin your deliberations, you desire to have a copy of the instructions they will be sent to you if you express your desire to have them to the bailiff at the door.

You are also entitled to have the exhibits which may have been introduced in evidence by both sides, some portions of which have been read to you, and you may want to examine in detail the exhibits as you are deliberating on the case.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However it is not my custom to exercise this right nor shall I exercise it in the present case. I shall [147] leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the Judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of

the law than that given you by the court,—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the Information and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and [148] expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. The offense with which the defendant is charged is: Entering into a contract to transport goods in interstate commerce without legal authority.

In this connection, you are instructed that the Information on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's guilt and no juror in this

case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A [149] witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial;

A witness false in one part of his or her testimony is to be distrusted in others; that is to say,

the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

The law does not require any defendant to prove his innocence, which, in many cases might be impossible. On the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable [150] doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find the defendant not guilty.

Reasonable doubt is not a mere possible doubt. Because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison, and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

While the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by

the same rules as the credibility and effect and value of the evidence of any other witness is determined. And the tests for determining the credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of other witnesses.

The defendant in each count of this information is charged with knowingly and wilfully for compensation selling and offering for sale transportation subject to the [151] Interstate Commerce Act, to-wit: transportation of property by motor vehicle in interstate commerce on public highways for compensation without a broker's license authorizing him to engage in such business.

The defendant is charged in each count of the information filed in this case, with the violation of Section 311(a) of Title 49 of the United States Code.

The Section provides:

" (a) License Required: No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: * * *"

Therefore, if you find from the evidence, beyond a reasonable doubt, that the defendant, Clem J.

Cusack, did knowingly and wilfully for compensation, and without a broker's license, sell, or offer for sale, transportation subject to the Interstate Commerce Act, or make any contract, agreement or arrangement to provide, procure, furnish or arrange for such transportation, or did hold himself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, you must find the defendant guilty as charged in such count of the information as to which you find these facts to be true beyond a reasonable doubt.

Interstate Commerce subject to the Act so far as the law applies in this case is transportation by motor vehicle for compensation from one state to another state in the United States.

You are instructed that a broker is defined within the meaning of Section 311(a) Title 49, U. S. Code, as being any person, not a common or contract carrier, by motor vehicle, who or which as principal or agent sells or offers for sale any transportation subject to the Interstate Commerce Act, or who holds himself out by solicitation, advertisement or otherwise as one who sells, provides, furnishes, contracts or arranges, for such transportation.

You will note that under the information the acts are alleged to have been done knowingly, and wilfully. Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

The word "wilfully" denotes an act which is intentional or knowing, or voluntary, as distinguished

from accidental. [153] When used in a criminal statute, it generally means an act done with a bad purpose. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

When the defendant seeks to disprove the allegations of an indictment or information a different rule applies than when the Government endeavors to prove them.

A defendant is not required to prove a fact beyond a reasonable doubt nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

The statute under which this prosecution was instituted also provides:

"That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier, or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express or water."

The defendant claims that he acted in the capacity of agent or broker for a motor carrier having a certificate of convenience and necessity to engage in the particular transaction wholly or jointly with

other motor carriers holding like certificates or permits.

If you find that he did so act, or if the evidence raises a reasonable doubt as to whether or not he did so act, you must acquit the defendant. [155]

Your first duty on retiring to the jury room to begin your deliberations in this case will be to select one of you, man or woman, to act as foreman of the jury.

As I have already told you, the jury in a Federal Court is what is known as a common law jury; that is, it requires that in order to arrive at a verdict, both in civil and criminal cases, it must be unanimous. In that respect it differs from the State law, at least in a civil case, where nine may reach a verdict. Of course, this is a criminal case, so even if it were governed by the State law it would still require a unanimous verdict. That is, all twelve jurors must agree upon the verdict.

For your assistance the clerk has prepared a form of verdict entitled, Court and cause, No. 19898. Criminal. Verdict.

We, the jury in the above entitled cause find the defendant Clem J. Cusack (blank) as charged in Count 1 of the information; (blank) as charged in Count 3; (blank) as charged in Count 4; (blank) as charged in Count 5 of the information; (blank) as charged in Count 6 of the information; (blank) as charged in Count 7 of the information; (blank) as charged in Count 8 of the information; (blank) as charged in Count 9 of the information; (blank)

as charged in Count 10 of the information. Dated April (blank) 1948.

(Blank) Foreman of the jury. [156]

As you have already been informed, the information originally contained 10 counts, but Count 2 has been dismissed, so there are only left 9 counts, being 1 and 3 to 10, inclusive.

If you find the defendant guilty as to Count 1 of the information, you will put the word "Guilty" in the blank space opposite that count. If you find him "Not Guilty," you will put those words there. If you find him guilty of the Count 3, you will put the word "Guilty" in the blank space opposite that count. If you find him "Not Guilty," you will put in those words and so on down the line to 4, 5, 6, 7, 8, 9 and 10. If you find the defendant guilty as to any of those counts, you will insert the word "Guilty" in the proper place. If you find him not guilty, you will insert the words "Not Guilty" in each count where you so find.

While you are required to return a verdict as to all the counts unless the Court should permit you, as the Court may at times, to return a verdict as to some of the counts only, your verdict need not be the same. In other words, you may find the defendant guilty as to one count and not guilty as to another. It is up to you to determine as to each count whether the evidence as to the particular count proves him guilty. If it does not, then you must acquit him. That applies, of course, to the entire case.

Before you can return a verdict as to any count you must [157] find beyond a reasonable doubt that

the evidence proves him to be guilty at the time charged in that particular count. The verdict must then be dated and signed by your foreman. After it has been properly filled out and signed by the foreman, you will return into court.

Are there any objections to the instructions given or the instructions refused? If so, an opportunity will be granted to counsel for either side to present your objections outside of the hearing of the jury.

Mr. Champlin: If the Court please, there is only one point on that last instruction. I might raise one clarification point. There is no objection generally.

(The following proceedings were had at the bench between Court and counsel, without the hearing of the jury:)

Mr. Champlin: There is a clarification on the point of being an agent for some company having an interstate permit. We would like to have it clarified as to this territory. If you find that he was the agent for a company having a permit in some other district, it would not apply.

(Discussion.)

The Court: Ladies and gentlemen of the jury, the object of the law in allowing counsel to make objections to instructions is demonstrated by what occurred in this case. Counsel has called my attention to the last instruction, which they feel should be amplified a little, and after discussing the [158] matter a little further I have decided to clarify it both in respect to the way they suggest and then I will add a clarification of my own. So that you will understand why, when the defendant presents a

defense there is a different rule which applies than the rule which obtains in the Government's case. So instead of the last instruction beginning "The statute under which this prosecution was instituted also provides" I will give the following instruction which will include that also:

When the defendant seeks to disprove the allegations of an indictment or information, a different rule applies than when the Government endeavors to prove it, and the defendant is not required to prove the fact beyond a reasonable doubt, nor by a preponderance of evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

The statute under which this prosecution was instituted also provides.

No such person shall engage in transportation subject to this chapter unless he holds a certificate or permit as provided in this chapter. In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or [159] which is not the lawful holder of an effective certificate or permit issued as provided in this chapter:

And provided further, That the provisions of this chapter shall not apply to any carrier holding a certificate or a permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transporta-

tion to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water.

The defendant claims that he acted in the capacity of an agent or broker for a motor carrier having a certificate of convenience and necessity to engage in a particular transaction, wholly or jointly with other motor carriers holding like certificates or permits. If you find that he did so act, or the evidence discloses beyond a reasonable doubt as to whether or not he did so act, you must acquit the defendant.

In all other respects the instructions stand as previously given. Any other objections to the instructions?

Mr. Champlin: No objections, your Honor.

Mr. Wegener: No objections, your Honor.

The Court: The clerk will now swear the bailiff. You will now follow the bailiff and begin your deliberations in the case. I hand to the bailiff the blank form of verdict.

(The jury retired at 3:12 p.m.) [160]

The Court: We will stand a recess until we hear from the jury.

(Jury returned at 4:00 o'clock p.m.)

The Court: Let the record show that the jury has returned, and the defendant is in court with his counsel.

Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have.

The Court: Hand the verdict to the bailiff, and then to the clerk and the Court. The clerk will read the verdict.

The Clerk: (Reading)

"United States District Court, Southern District of California, Central Division

No. 19,898 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLEM J. CUSACK,

Defendant.

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Clem J. Cusack,

Guilty as charged in Count 1 of the Information;
Guilty as charged in Count 3 of the Information;
Guilty as charged in Count 4 of the Information;
Guilty as charged in Count 5 of the Information;
Guilty as charged in Count 6 of the Information;
Guilty as charged in Count 7 of the Information;
Guilty as charged in Count 8 of the Information;
Guilty as charged in Count 9 of the Information;
Guilty as charged in Count 10 of the Information;

Dated: Aril 21, 1948.

MABEL S. QUARY,
Foreman of the Jury.

The Court: The clerk will enter and record the verdict.

Do you desire the jury polled?

Mr. Wegener: No, your Honor.

Mr. Champlin: We are satisfied.

The Court: You don't desire the jury polled?

Mr. Wegener: No.

* * *

The Court: I will be glad to hear from the defendant. The defendant does not impress me as being a man who has been in trouble before. Let us continue it until tomorrow morning at 10:00 o'clock and I will impose sentence at that time. I will order that the matter be not referred to the Probation Officer.

(The matter was here continued until tomorrow morning, April 22nd, 1948, at 10:00 o'clock a.m. and the defendant allowed to remain at liberty on bond.) [162]

Los Angeles, California, Thursday, April 22, 1948,

10:00 A.M.

The Clerk: 19898 Criminal. United States of America vs. Clem J. Cusack.

The Court: This report was just presented to me. I will read it. Have counsel seen the report?

Mr. Champlin: Yes.

Mr. Wegener: Yes.

The Court: This may be filed. I will hear anything further you desire to say.

Mr. Champlin: The Government has nothing more to say, your Honor.

The Court: I will hear Mr. Wegener.

* * *

Mr. Wegener: I would like to ask if a motion for arrest of judgment can be made in the proceedings.

The Court: There is no provision in the rule.

Mr. Wagener: Under Rule 34.

The Court: No oral motions can be made. There is no provision for an oral motion but if you desire to make a motion at the present time I will entertain it, and the minute order will show that you did so. If you will state your grounds.

Mr. Wegener: At this time I would like to make a motion to set aside the verdict: First, upon the ground that the evidence in the case does not support the judgment for a [163] violation of the brokerage section of the Code. And a like motion on the grounds that prejudicial statements were made in open court to the effect that only the mere holding out of a person to sell transportation service subject to the Act constituted a violation of the brokerage section of the Code. And on the further ground that statements were made to the effect that—

The Court: Are you referring to statements made by the Court or statements made by the counsel for the Government?

Mr. Wegener: Both, your Honor.

The Court: You took no exception to the instructions and any statement I made. I stated to

the jury that I would instruct them as to the law, and you cannot assign error on the part of the Court in any discussion with counsel without calling the Court's attention to it, but even then I warned the jury that what I was saying was not to be taken as an instruction on the law.

Mr. Wegener: As I recollect, the thing before the Court was to the effect that the negative parts of the exception of the statute is not pleaded in the bill or information, and they could be proved in court and there was no evidence to support the negation of the statute.

The Court: That goes to the sufficiency of the evidence, but I am talking about the statements supposed to have been made, stating in substance what you said now. I want to find [164] out if you are referring to anything the Court said during the course of the argument on the instructions or anything that counsel for the Government said.

Mr. Wegener: There is a statement also made in the argument of counsel for the plaintiff to the jury to the effect that the brokerage bond is to indemnify the public against such actions as these.

The Court: The answer is twofold. In the first place, whenever you object to the statement of counsel for the government it is your duty under the law, and it is the practice even without rules of court, to call the attention of the Court to it so the Court can admonish the jury, if the Court thinks your objection is well taken, and to admonish counsel not to repeat it. So far as I remember you took no exception whatever to his remarks. Furthermore,

if you do not you cannot complain. He has a right to argue the facts as he sees them. The jury were warned that the arguments of counsel are not evidence and that the only law they are to follow is that given by the Court in its instructions. So in the absence of that, I can't see that anything was said by counsel that could be considered error or anything said by me in the course of the trial, and in the ruling on the evidence I gave my reasons and warned the jury that anything I said should not be considered by them as an instruction.

Mr. Wegener: The way I understood the Court's interpretation of the statute was that the Court's instruction of the wording was to the effect, and I am sure the impression of the jury was to the effect that in the limitation of the statute itself was that the defendant was holding himself out as a broker.

The Court: There is no such statement in the record and certainly not in my instructions. In fact, I said to you while we were discussing the instructions to be given, that while I did not agree with you that the exception must be pleaded, that I would instruct the jury that the exception constituted a complete defense, and I did so instruct them. You are bunching the general instructions which the Court gave to any ruling he may have made on your motions and you can't do that. You have got to separate the two and indicate wherein a ruling that I made during the course of the trial was erroneous, because any statement I made in a ruling on evidence is not an instruction, and the

jury was so warned, and in my charge to the jury even though you did not present me with any instructions, I gave the instruction which stated that if a reasonable doubt arises in your minds as to whether or not he was such agent he was entitled to an acquittal. Then when my attention was called by the Government to what he thought was an obscurity that should be clarified, I clarified it in a manner agreeable to both of you. In addition to that I gave a special instruction so the jury would have before [166] them clearly the proposition that when the defendant presents the rule of proof beyond a reasonable doubt, even a preponderance of evidence does not apply. All he has to show is sufficient evidence from which a reasonable doubt may arise, and if such doubt arises he is entitled to it. So the only defense you had was fully and adequately presented before the jury even without any suggestion on your part, because if the Government had not raised that point, that instruction I gave of my own instance, which I wrote myself, would have been the only way by which your defense was presented to the jury. It was not my duty to do so. That is why you are required to offer suggestions and that is why I am required before the argument to inform you as to my action on the instructions, and that is why, in addition to that, you have objections to instructions given or refused. Rule 30 says:

"At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in

the requests. At the same time, such requests shall be furnished to the adverse parties. The Court shall inform counsel of his proposed action upon the requests prior to the argument to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

There was no objection on your part whatsoever, and the only suggestion we had, which was outside of the hearing of the jury, was as to the Government's suggested clarification of one of the instructions, to which I agreed and which I modified in the manner I have already indicated. That is the law which governs. Nothing that I said in ruling upon any motion directed to the evidence could possibly be misconstrued by the jury, because they were instructed specifically that any discussion between you and me was to be disregarded as not being an instruction as to the law, but merely an answer to counsel's argument.

Mr. Wegener: Thank you, your Honor, I appreciate that and it has clarified some points for me which I had been trying to figure out.

I would like to make a motion at this time, your Honor, to arrest the judgment, based on Rule 34, that the information as set up by the Government did not charge an offense against the defendant and no evidence was offered by the plaintiff to prove

that the defendant was not within the exceptions of the Code.

The Court: Is there anything you want to add, Mr. Champlin? [168]

Mr. Champlin: No, your Honor, there is nothing more at this time.

The Court: Both motions will be denied and I order that in any transcript to be prepared in this case there shall be included, both in the official typewritten transcript and in the portion of the transcript which is printed, the remarks I have just made as to the various points, so that I will not try to repeat them. But I repeat for the record this fact: At no time during the course of the trial was any exception taken to any remarks made by the court in answer to counsel's objections, or any remarks made by counsel for the Government. However, the Court on its own motion, as the record will show, cautioned the jury that any statements made by the Court in answer to counsel's objection to the introduction of certain evidence, should not be taken as rulings on the law, or as an expression of opinion on the facts. In the instructions the Court gave its usual instructions which stated that the Court has no opinion as to any of the facts in the case and if from anything that occurred they think the Court has an opinion, they have the right to disregard it.

The second point, that the Government failed to prove that the defendant was within the exception, was made the basis of a motion to acquit at the close of the Government's case. It was denied upon the

ground stated at the time, and the Court here incorporates as a part of those remarks, that [169] the Court made while the argument on the motion for an acquittal was made, stating why in the Court's opinion the exceptions under 311(a) Title 49 need not be pleaded or proved as a part of the Government's case, and while there was a distinction between the exception provided in 306 and the exception provided in 311, in that Section 306 only concerned carriers engaged in business at a certain time and were made subject to the Act, even when that was the case the Government must show that the carrier was only engaged at the time the law applied, while in 311 there is no date limit. However, the motion might have been well taken at the time, but it is not well taken now because the defendant has taken the stand and when the defendant takes the stand and gives his version of the transaction, and by claiming agency, he presents his question of agency as a question of fact and he is not in a position to claim that he was within the exception.

In addition to that attention is called to the fact that counsel for the defendant did not present to the Court any instructions on behalf of the defendant, but, notwithstanding this, the Court gave a very elaborate instruction to the jury setting forth the exception under 311 and stating to the jury that if the evidence before them showed that the defendant was within the exception, or it even raised a reasonable doubt as to whether he was, he was en-

titled to an acquittal. [170] That when the Government sought to clarify the instructions given, the Court reworded the language suitable to both and elaborated further on the quantum of proof.

At the conclusion of that the Court asked again of counsel if they had any further objections and counsel for both sides said that they had none.

I am making this statement for the record at this time so it will appear in one place rather than be scattered throughout the record.

For these reasons the motions just made, and each of them, will be denied.

For the record I will repeat: Have you anything further to say in regard to the sentence, or any information in addition to that which was supplied me in this report by Mr. Shoup, Special Agent for the Interstate Commerce Commission?

Mr. Champlin: The Government has nothing further in the way of information to offer the Court.

The Court: Now I will hear from the defendant's counsel as to anything further he wants to say.

* * *

The Court: Is there any legal cause to show why judgment should not be pronounced at this time? (To the defendant) Will you please arise?

I think the evidence in this case shows not only a wilful, if any distinction can be made in wilfulness, but [171] a deliberate setting out to violate the law and leading people to believe that the defendant was what he was not. I think it is quite evident

from this advertisement and also from the bill of lading. In the advertisement the defendant is not holding himself out as agent for anyone else. This advertisement which is Plaintiff's Exhibit 8 reads:

"Long distance moving to and from everywhere.

"Daily bookings to all principal cities. Our return load system saves you $$.

"Door to door service.

"No crating necessary. Don't move before checking our rates.

"Lincoln Storage & Transfer Co.

"Agent 601 South Vermont Avenue.

"24-hour telephone service. Drexel 5297."

This constitutes one-quarter of a classified ad in the classified directory, and I trust that a photostatic copy of this go up with the appeal, so the court will see the difference in type, which is in big black faced type in the title, Long distance moving. And in very small letters the word "Agent," but not for whom. In other words, a person reading this could look at the entire page and not see the word "Agent." If he did he wouldn't be any wiser. He is led to believe, as the defendant himself testified, that he was engaged in the business of transportation himself, not [172] soliciting for others. That is borne out by the bill of lading.

The bill of lading has a blank space for the name, as illustrated by Exhibit 1. The title of it is "Lincoln Transfer Co." Shipper's copy. That is at the top. And at the bottom it says "Carrier: Von Der Ahe. C. J. Cusack," but the others, 11 and 2 and 3, contain the name of the Lincoln Transfer at the top

and at the bottom it says "Lincoln. C. J. Cusack." And they have scratched out the word "Carrier" and left the word "Agent."

The evidence clearly shows that at no time were these persons informed that he was merely an agent soliciting for others, and that the services were rendered by someone else. The only real invoices, which may be called such, would indicate the agency on this perhaps by the United Van Lines, such as Exhibit 13, which contains the actual charges, and which were rendered after the transportation had been effected.

No. 7, which is entitled "Order for Services," like the others, except the last one I have mentioned, has the word "Lincoln" and "C. J. Cusack," and the word "Agent" printed on the side, but no other indication. So I feel that there is not only such wilfulness as may be inferred from the facts, but a deliberate attempt to make the shippers believe that the defendant was actually engaged in the transportation and solicitation of trade without a license. [173]

No legal cause being shown, it is the judgment of the Court that for the offense of which you stand convicted on Count I of the information that you be fined the sum of $100;

For the offense of which you stand convicted on Count III for the information that you be fined the sum of $100;

It is the judgment of the Court that for the offense of which you stand convicted on Count IV

of the Information that you be fined the sum of $100;

That for the offense of which you stand convicted on Count V of the Information that you be fined the sum of $100;

It is the judgment of the Court that for the offense of which you stand convicted on Count VI of the Information you be fined the sum of $100;

It is the judgment of the Court that for the offense of which you stand convicted on Count VII of the Information you be fined the sum of $100;

It is the judgment of the Court that on Count VIII of the Information, for which you stand convicted, that you be fined the sum of $100;

It is the judgment of the Court that for the offense of which you stand convicted on Count IX of the Information that you be fined the sum of $100;

It is the judgment of the Court that for the offense of which you stand convicted on Count X of the Information you [174] be fined the sum of $100.

I understand that there is no prior conviction of this defendant.

Mr. Champlin: That is correct. We have no information of any prior violation.

The Court: There have been no prior violations so far as the record shows:

Mr. Champlin: That is correct.

The Court: Section 322 says: "Any person knowingly and wilfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not herein provided, shall, upon conviction thereof,

be fined not more than $100 for the first offense and not more than $500 for any subsequent offense."

It is therefore the judgment of the Court that the fine be as stated, and that the total fine be the sum of $900.

I may say for your benefit that in all these cases where wilfulness appears, I have imposed the maximum fine. Sometimes, when there are mitigating circumstances I have allowed some of them to run concurrently. One of which there were 30 violations I allowed to run concurrently. But in this case I don't think I would be justified in doing that. I think the maximum should be imposed because of the wilfulness of the violation. [175]

The defendant will stand committed in lieu thereof if the fine is not paid.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 9th day of August A.D., 1948.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed Sept. 28, 1948.

[Endorsed]: No. 11922. United States Court of Appeals for the Ninth Circuit. Clem J. Cusack, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 28, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 11922

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLEM J. CUSACK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Appellee and Plaintiff.

APPELLEE'S BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLEM J. CUSACK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Appellee and Plaintiff.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This appeal is from a judgment of conviction for the offense of unlawfully selling and offering for sale transportation of property by motor carrier in interstate commerce, for compensation, without holding a broker's license issued by the Interstate Commerce Commission, said acts being in violation of Title 49, U. S. Code, Section 311(a), said judgment having been entered by the United States District Court for the Southern District of California at Los Angeles, California, on April 22, 1948. [Tr. 18.]

The defendant and appellant, Clem J. Cusack was charged by an information in ten similar counts with having violated the Interstate Commerce Act by contracting, offering to contract, and holding himself out as one who

sells, provides, procures, and arranges for such transportation of household goods by motor carrier in Interstate Commerce from Los Angeles, California, to the various points in the United States or from distant points in other states to Los Angeles, without having a broker's license as required by Section 311(a) of Title 49, U. S. Code. The dates of said various offenses fall within 1946 and 1947. [Tr. 2-10.]

On Count Two of the Information, a motion to acquit was made by the defendant at the end of the Government's case, which was granted by Court on April 21, 1948. [Tr. 122, 123.]

A verdict of guilty was returned by the jury on all of the ten counts as charged, except Count II, in which case a judgment of acquittal was entered by the Court. [Tr. 16.]

It was further adjudged on April 22, 1948, that the defendant pay a fine to the United States in the sum of $100 on each of the nine counts in which he was convicted, making a total of $900 in fines to be paid. The defendant was committed to a jail type of institution in lieu of payment of his fine or until said fines were paid or the defendant otherwise discharged according to due process of law. [Tr. 19.]

A notice of appeal from the above-entitled judgment was filed by defendant on May 3, 1948, to this Court [Tr. 19, 20], which Court has appellate jurisdiction under Title 28, U. S. Code, Sections 1291 and 1294(1).

STATEMENT OF THE CASE.

The Facts.

Since no statement of facts has been set forth in appellant's opening brief, the following summary of evidence pertinent to the questions before this Court is hereby submitted.

The appellant and defendant, Clem J. Cusack was in business in Los Angeles, California, and was known as the Lincoln Transfer and Storage Company [Tr. 152], but had no trucks of his own and did no hauling in interstate commerce whatsoever. [Tr. 152.] He had no license or permit, or certificate of convenience and necessity as a motor carrier in interstate commerce. It is undisputed that he had no broker's license issued by the Interstate Commerce Commission. [Tr. 152; Pl. Exh. 5 and 6, Tr. 80-83.] However, he advertised in the local newspapers [Tr. 92] and in the classified advertising section of the Telephone Directory under the name of Lincoln Transfer and Storage Company. [Tr. 152, Pl. Exh. 8; also Tr. 89-91.]

The latter advertisement required one-quarter page or one-fourth of a classified ad in the directory and read as follows:

> "Long distance moving to and from everywhere.
> "Daily bookings to all principal cities. Our return load system saves you $ $.
> "Door to door service.
> "No crating necessary. Don't move before checking our rates.
> "LINCOLN STORAGE AND TRANSFER COMPANY.
> "Agent. 601 South Vermont Avenue.
> "24 Hr. telephone service Drexel 4297. [Pl. Exh. 8 and Tr. 182.]

Defendant maintained an office in Los Angeles. The address and business telephone being the same as that stated in the advertisement set forth in Plaintiff's Exhibit 8. [Tr. 154, 155.] It is undisputed that defendant made contracts [Tr. 151 and 152] with at least nine shippers or private parties for shipment of their household goods. He arranged for or attempted to procure transportation to and from Los Angeles and received compensation therefor.[1]

In all these transactions, the shipper was credited on his freight bill with money received by defendant Cusack, but who received a commission himself from each of the transactions. [Tr. 154.] In procuring business and transportation for one motor carrier, the Commission received was twenty per cent of the complete freight cost. [Tr. 155.]

In the matter of shipments involved in Counts I, III, and VII, wherein goods were delivered by Von der Ahe

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[1]For evidence on Count One and Testimony;

Count I. [Tr. 147; Tr. 83-87, also Pl. Exh. 7 and Tr. 86.] Los Angeles to San Antonio, Tex., shipment; $45 paid def.

Count III. [Tr. 146, 147; Tr. 68-74, and Pl. Exh. 4.] Freemont, Neb., to Calif. shipment; $100 paid to def.

Count IV. [Tr. 144, 153; Tr. 31-39, and Pl. Exh. 1.] Cedar Rapids, Ia., to Gardena, California shipment; $50 paid to def.

Count V. [Tr. 98-103; Tr. 142.] Covington, Ky., to Los Angeles, shipment; $85 paid to def.

Count VI. [Tr. 142; Tr. 39-48, and Pl. Exh. 2.] Chicago to Long Beach, shipment; $50 paid to def.

Count VII. [Tr. 141, Tr. 48-54, and Pl. Exh. 3.] Charleroi, Pa., to Los Angeles, Calif., shipment; $30 paid to def.

Count VIII. [Tr. 106-109; Tr. 135, and Pl. Exr. 12.] Hibbing, Mont., to Long Beach, shipment; $50 paid to def.

Count IX. [Tr. 133, 134; Tr. 92-95, and Pl. Exh. 9.] Long Beach to Wash., shipment; $50 paid to def.

Count X. [Tr. 129-132; Tr. 110-115.] Long Beach to Belgrade, Mont., shipment; $50 paid to def.

Moving and Storage Company of St. Louis, as agents of National Van Lines, the latter had a certificate of convenience and necessity or Interstate Commerce Commission permit to serve western territory. The Von der Ahe Company had no through permit to California, but did have a leasing agreement as an agent for National Van Lines. [Tr. 55-57.] Defendant was not an agent for National Van Lines and Von der Ahe Company had no authority from its principal to employ a sub-agent without written authority. No written authority was given to employ defendant as an agent or sub-agent. [Tr. 57.]

In the transaction involved in Count IV, defendant did not say he was an agent for the Von der Ahe Company, but said they would move the goods in question; he represented that he was doing business as Lincoln Van and Storage Company. [Tr. 35.] Relative to the transaction under Count V, defendant represented that his own trucks would haul the shipment in Interstate Commerce; namely, the Lincoln Transfer Company. No agency for another carrier was disclosed. [Tr. 99-100.] In the transaction under Count VI, a like representation was made. [Tr. 42-43.] Regarding the shipment involved in Count VIII, defendant did not disclose an agency for any other company: he completed the transaction but another carrier delivered the goods. [Tr. 106-112, and Pl. Exh. 12.]

Relating to the transaction under Count IX, defendant represented that he had his own van [Tr. 94]; but he knew the Red Ball Company was the agent for North American Lines which delivered the goods in question from Los Angeles to Seattle: that the Red Ball Company had no Interstate authority: that he had no agreement with North American Lines as sub-agent [Tr. 154], but that he had an agreement with Red Ball Company. [Tr. 153.] In

relation to the transaction under Count X the Belmont Storage Company was an agent for United Van and Storage Company which hauled the goods from California to Belgrade, Mont. [Tr. 113], and the Belmont Company had no interstate authority. Defendant dealt with the Belmont Company and gave them authority to forward the goods by United Van Lines and signed the letter of authority as Lincoln Transfer Company, shipper. [Tr. 114, and Pl. Exh. 13.] Defendant was not an agent for United Van Lines, and had no arrangement with them at the time of the contract. [Tr. 154.] Under the general advertisement published by defendant in the telephone directory the word "agent" appears in small print, but does not say agent for whom. [Pl. Exh. 8, and Tr. 182.]

Questions Involved.

1. Whether or not there was sufficient evidence in the record to justify the denial of a motion for acquittal at the end of the Government's case.
2. Whether or not the trial court abused its discretion in its denial of a motion to set aside the verdict and arrest the judgment.
3. Whether there was substantial evidence on each count to support the verdict on that count.
4. Whether a defendant may complain upon appeal that he was convicted under the wrong section of the Act where he takes the stand and testifies, admitting most of the elements necessary to prove the offenses charged.
5. Whether an instruction phrased in the language of the statute is reversible error where the defendant stated to the Court that he had no objection to the instructions as given to the jury.

ARGUMENT.

Summary.

The appellant and defendant bases his appeal primarily upon the ground that the trial court committed error in overruling his motion for acquittal, and further that error was committed in denying his motion to set aside the judgment. Further grounds alleged are that there was no evidence in the record to support a verdict of guilty as charged; that the defendant was convicted under the wrong section of the Statute, if anything. Also, that the Trial Court committed error either in its instruction or by representing to the jury that a mere holding out to perform or arrange transportation subject to the Interstate Commerce Act constituted brokerage under Section 311(a) of the Act.

At the end of the Government's case, defendant made a motion for acquittal which was denied. At that point, the Government had rested after calling witnesses who testified in connection with each of the nine counts on which a verdict was rendered at the end of the trial. A prima facia case was made out with substantial evidence on each count that defendant had become known to the witnesses through advertisement in the telephone directory or in local newspapers and that he had come to their homes or met them elsewhere to discuss the movement of their household goods in Interstate Commerce. In all of these cases, the parties had paid a sum of money by way of down payment or as a part of the shipping charges directly to Mr. Cusack. At no time did he represent to them that he was an agent for another carrier but left the impression by direct statement or inference

that he had his own trucks and performed the service in which they were interested.

The rule is well-established according to authorities hereinafter cited that where substantial evidence has been introduced to support the charges contained in an information a motion for acquittal should be denied since it is a question for the jury to determine whether the effect of the evidence is sufficient to overcome any reasonable doubt as to the defendant's guilt. Likewise, the effect and weight of the fair inferences to be drawn from the evidence is one for the jury.

After the motion for acquittal was denied, the defendant took the witness stand and testified in his own behalf. He admitted that he had no broker's license from the Interstate Commerce Commission nor did he have a certificate of convenience and necessity as a common carrier or as a motor carrier for transporttaion of goods in interstate commerce. Furthermore, he stated that he had no trucks or equipment and did not engage in interstate hauling. He admitted that he made contracts and arrangements with the various people who testified under each of the nine counts of the information, that they paid him money as a down payment on the shipment of freight; that in each case, he received a certain commission from the money collected amounting to twenty per cent in one case and that he made arrangements with other carriers to handle the business he obtained through his contacts. In substance, all of the elements of the offenses charged in the information were admitted by the defendant in addition to the substantial evidence which had been adduced from the Government witnesses.

The issues of fact in the case were simply whether or not the defendant had contracted, arranged for, and procured transportation on behalf of the persons named in the information; whether or not he had done so for compensation, and whether or not he had a broker's license as required by the section of the Interstate Commerce Act in question. The affirmative defense to the charge was whether or not the defendant was a bona fide agent for some carrier which had a certificate of convenience and necessity and as such came within the exception stated in the section of the Act under which he was charged. If the jury found that he was a bona fide agent working for a fixed salary, using the standard set up in the *Chicago Food Mfrs.* case hereinafter cited, no broker's license was required, and therefore he should be acquitted. Since these issues were presented to the jury under a proper instruction favorable to the defendant's position, although no jury instruction was requested by the defendant, the verdict was returned for conviction and thus the questions of fact were resolved by them.

The defendant's motion to set aside the verdict and arrest the judgment was properly denied by the trial court in the exercise of its sound legal discretion. The cases hereinafter cited hold that the denial of such a motion is a matter of discretion with the trial court and will not be disturbed on appeal unless there was an abuse of discretion. No motion was made for new trial. The defendant indicated that he was satisfied with instructions of the trial court before the jury retired to deliberate on their verdict. It must be noted also that whatever objections the defendant had to the form of information, it was not raised by motion to strike prior to the trial.

The only question raised concerning defects in the information related to the failure to allege and prove that defendant did not come within the exceptions stated in the section. Any defect here, which is not conceded, and not supported by the authorities hereinafter cited, was cured by the defendant taking the stand in his own behalf and placing the issue of fact squarely before the jury as to whether or not he was a bona fide agent of a carrier and therefore within the exception.

Therefore, it is submitted that a full and impartial trial was had; that the defendant's rights were preserved by adequate instructions of the trial court; that no reversible error was committed by the Court and that upon the issues of fact the jury has spoken and the judgment should be affirmed.

POINT I.

The Trial Court Committed No Error in Denying the Defendant's Motion for Acquittal at the End of the Government's Case.

A. The Government Was Not Required to Plead the Exceptions Set Forth in the Statute or Prove That Defendant Did Not Come Within Them.

The appellant in his motion for acquittal at the end of the Government's case cited the case of *U. S. v. English* (C. C. A. 5, 1944), 139 F. 2d 885. This case was cited as authority for the proposition that where a statute or a section thereof sets forth certain forbidden acts and includes therein certain exceptions which are mostly bound with the elements of the offense, the pleading must allege the defendant is not within the exception. This case is referred to again on page 10 of appellant's opening brief,

line 17, and it is stated therein that since this Court is familiar with that decision and with this Act the defendant has little to worry about in the ultimate decision on this appeal.

The *English* case must be distinguished both on its law and on the facts. It was an appeal from the District Court of the United States for the Eastern District of Texas to the 5th Circuit Court of Appeals. An information in 22 counts was filed against English charging that he engaged as a common carrier in Interstate Commerce by motor vehicle without having a certificate of public convenience and necessity from the Interstate Commerce Commission, in violation of Section 306(a) of Title 49 U. S. Code. The court below sustained a motion to quash the information on the ground that each count thereof was defective in that it failed to negative the statutory exceptions. The sole question upon appeal was whether or not the information was required to negative the statutory exceptions in order to charge a valid offense. In that case the Court affirmed the decision of the District Court but had this to say about the exception to the rule so affirmed:

> "If the Congress had intended that the exceptions written into the statute should be for defensive use only, this result might easily have been accomplished by omitting the opening clause of the statute, thereby causing the section to begin: 'No common carrier by motor vehicle * * *.' Instead Congress chose to begin the statute with the words 'except as otherwise provided in this Section and in Section 310(a)'. This deliberate action must be construed to indicate the legislative intent that the exceptions referred to should be read into and construed with the affirmative definition of the offense."

At this point, we must observe that Section 311(a) of Title 49, U. S. Code, under which the defendant was charged and convicted reads as follows:

> "No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: * * * And provided further that the provisions of this paragraph shall not apply to any carrier holding a certificate or permit under the provisions of this chapter or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water."

Thus it is clear that an important distinction exists according to the rule of the *English* case between the wording of Section 311(a) and Section 306(a). The Court went on to clarify the rule by citing the leading case of *United States v. Cook,* 17 Wall. 168, 84 U. S. 168, 21 L. Ed. 538, in its opinion on page 886. In the *Cook* case, the Court held that where a statute defining an offense contains an exception in its enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but where the

language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without reference to the exception, the matter contained in the exception must be set up as a defense by the accused.

It is submitted, therefore, that the present case upon appeal comes within the rule of *McKelvey, et al. v. United States,* 260 U. S. 353, a case that went upon certiorari from the Circuit Court of Appeals for the 9th Circuit and decided in 1922. There were five petitioners who were indicted, tried, and convicted in the District Court of the United States for the District of Idaho upon a charge of unlawfully preventing and obstructing by means of force, threats and intimidation, free passage over and through certain unoccupied public lands of the United States by designated persons. The Circuit Court of Appeals affirmed the judgment, and it was affirmed by the U. S. Supreme Court.

One ground of objection was that the indictment contained no showing that the accused were not within the exception made in the proviso in question.

The Court held that this is not a valid ground and had this to say in stating the rule:

> "By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." (Cases cited.)

Therefore, in accord with the authorities above cited, the trial court committed no reversible error in denying the defendant's motion for acquittal, which was based upon the Government's failure to prove that the defendant was within the exception stated in Section 311(a). It was pointed out that in the Court's opinion there was a distinction between the exception provided in Section 306 and Section 311, and this distinction was carefully preserved by the *English* case cited by the appellant and set forth herein above. [Tr. 179-180.]

B. The Evidence Was Sufficient and Adequate to Sustain a Denial of Defendant's Motion for Acquittal.

In denying the motion of defendant for acquittal and commenting upon the evidence, the trial court had this to say:

> "And furthermore, the proof here shows conclusively, [110-C] so far as a *prima facie* case can show, that this man at no time had a permit. And, futhermore, that he did not have any relation of agent or employee to the carrier who transported the goods. It may be well that the evidence will show to the contrary."

Also, on pages 181-183 of the transcript of record, the Court said before passing judgment, but after the verdict had been rendered and the jury excused, concerning the evidence in this case:

> "The evidence clearly shows that at no time were these persons informed that he (Cusack) was merely an agent soliciting for others, and that the services were rendered by someone else. The only real invoices, which may be called such, would indicate the agency on this perhaps by the United Van Lines, such

as Exhibit 13, which contains the actual charges, and which were rendered after the transportation had been effected."

"I think the evidence in this case shows not only a wilful, if any distinction can be made in wilfulness, but [171] a deliberate setting out to violate the law and leading people to believe that the defendant was what he was not. I think it is quite evident from this advertisement and also from the bill of lading. In the advertisement the defendant is not holding himself out as agent for anyone else. (Reference was made to Plaintiff's Exhibit 8.)"

The issues of fact which were presented to the jury in this case were simply whether or not the defendant, Cusack, was a person who advertised or held himself out or contracted and procured transportation for household goods to be shipped in Interstate Commerce without having a broker's license issued by the Interstate Commerce Commission or whether he was a bona fide agent or employee of some carrier which had the proper authority and necessary permits to engage in interstate commerce. Since the latter issue is contained in the exception set forth under Section 311(a), it became a matter of affirmative defense under the rulings of the trial court and when the defendant took the witness stand as he did in this case [Tr. 129-155] he placed this issue squarely up to the jury.

Thus as the trial court pointed out on page 180 of the transcript of record, the defendant by taking the witness stand presented his question of agency as a question of fact and he is not in a position to claim that he was within the exception. (As a question of law upon appeal.) (Italics ours.)

Notwithstanding the fact that counsel for the defendant did not present any instructions to the trial court on behalf of the defendant, the court gave a very elaborate instruction to the jury setting forth the exception under 311 and stating to the jury that if the evidence before them showed that the defendant was within the exception, or it even raised a reasonable doubt as to whether he was, he was entitled to an acquittal. [Tr. 180-181.] The jury was further instructed that:

> "The defendant claimed that he acted in the capacity of agent or broker for a motor carrier having a certificate of convenience and necessity to engage in the particular transaction wholly or jointly with other motor carriers holding like certificates or permits.
>
> "If you find that he did so act, or if the evidence raises a reasonable doubt as to whether or not he did so act, you must acquit the defendant. [155]" [Tr. 166-167.]

Therefore, by having the issues of fact placed before the jury and the affirmative defense brought to their attention by an adequate instruction, these questions were resolved by the jury in their verdict, and it is submitted that the evidence as set forth in the transcript of record and in the summary of facts published herein is amply sufficient to sustain the verdict of the jury on each and every count.

Rule 29(a) of the Rules of Criminal Procedure provides as follows:

> "(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own

motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

However if there is substantial evidence to support the charges contained in an information, a motion for acquittal should be denied because it is a question for the jury to determine whether the effect of the evidence is such as to overcome any reasonable doubt of guilt. In *Gorin v. United States* (C. C. A. 9, 1940), 111 F. 2d 712, at 721, this Court said:

> "Appellants contend that the court erred in failing to direct a verdict in their favor, because of insufficiency of evidence. The applicable rule is that if there is substantial evidence to support the charges, then a peremptory instruction of acquittal should not be made, but it is a question for the jury to determine whether 'the effect of the evidence was such as to overcome any reasonable doubt of guilt.' *Pierce v. United States,* 252 U. S. 239, 251, 252, 40 S. Ct. 205, 210, 64 L. Ed. 542. Likewise, the effect and weight of the fair inferences to be drawn from the evidence for appellee is for the jury. *Gunning v. Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720."

POINT II.

The Trial Court Committed No Error in Denying the Motion of the Defendant to Set Aside the Verdict and for Arrest of Judgment.

A. No Prejudicial Instruction Was Given the Jury by the Trial Court Relative to the Issue of the Defendant Holding Himself Out as a Broker.

In support of his motion for arrest of judgment and to set aside the verdict, the defendant relied upon two grounds, first that the evidence in the case does not support the judgment, and second that prejudicial statements were made in open court to the effect that only the mere holding out of a person to sell transportation service subject to the Act constituted a violation of the brokerage section of the Code. [Tr. 174.] Defendant had this further to say on page 176 transcript of record:

> "The way I understood the Court's interpretation of the statute was that the Court's instruction of the wording was to the effect, and I am sure the impression of the jury was to the effect that in the limitation of the statute itself was that the defendant was holding himself out as a broker."

The trial court's answer to this on page 176:

> "There is no such statement in the record and certainly not in my instructions."

The trial court did instruct the jury however in the language of the statute, Section 311(a) of Title 49 of the United States Code as follows:

> "(a) License Required: No person shall for compensation sell or offer for sale transportation subject to this chapter or shall make any contract agreement,

or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions. * * *"

"Therefore, if you find from the evidence, beyond a reasonable doubt, that the defendant, Clem J. Cusack, did knowingly and wilfully for compensation, and without a broker's license, sell, or offer for sale, transportation subject to the Interstate Commerce Act, or make any contract, agreement or arrangement to provide, procure, furnish or arrange for such transportation, or did hold himself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, you must find the defendant guilty as charged in such count of the information as to which you find these facts to be true beyond a reasonable doubt." [Tr. 164-165.]

"The jury was further instructed that a broker is defined within the meaning of Section 311(a), Title 49, U. S. Code, as being any person, not a common or contract carrier, by motor vehicle, who or which as principal or agent sells or offers for sale any transportation subject to the Interstate Commerce Act, or who holds himself out by solicitation, advertisement or otherwise as one who sells, provides, furnishes, contracts or arranges, for such transportation." [Tr. 165.]

It is submitted that the above instructions embody a correct statement of the law in that they follow the language of the statute and the definition of a broker as given under Section 303(a) (18). It is further submitted that the evidence is amply sufficient to warrant a finding by the jury that the defendant did hold himself out as one who contracts, arranges for, and procures transportation of household goods in interstate commerce.

A conviction under this section was sustained in the 5th Circuit Court of Appeals, 1947, under a similar set of facts in the case of *Garland v. United States,* 164 F. 2d 487. In that case the Court cited *Martin v. United States,* 10 Cir., 100 F. 2d 490, and pointed out that all of the attacks against this Federal statute (311(a)) had been raised after the conviction of the appellant in the District Court and that all of such points had been correctly decided against him.

The Motor Carrier Act was held to be constitutional in the *Martin* case, *supra,* and the Court rejected the contention that it failed to define a standard of conduct from which it may be determined when and under what circumstances its provisions are violated. This case defines all the terms which are relevant to the present case on appeal such as a broker, common carrier, by motor vehicle, and sets forth the terms of the various exceptions to the statute in question. There was also a question raised in that case of variance between pleading and proof, and in respect to that question the Court said that there was evidence from which the inference could be reasonably drawn

that the system existed throughout a large part of the United States and that all of appellants understood it and participated in it. And that the proof substantially conformed to the charge.

In the *Martin* case, as in the present case on appeal, the appellant testified in his own behalf. Otherwise appellants did not offer any evidence. There the court said an examination of the entire record indicates clearly that the verdict was right, and that the reference to Section 211 of the Statute cannot be regarded as substantial prejudice. A judgment should not be reversed for a harmless error. Cases cited were *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314, and *Tanchuck v. United States,* 10 Cir., 93 F. 2d 534.

In the case of *Interstate Commerce Commission v. Chicago Food Mfrs. Pool,* 39 Fed. Supp. 283 at 290 and 291, a distinction is drawn by the Court between a broker and a salaried agent. In that case, it was held that the defendant was not a broker but an agent for certain carriers and that he received a salary and worked for one employer. He did not advertise or hold himself out to the public as a broker, and apparently he did not solicit any shipments which could not profitably be combined with those of his employer.

As set forth hereinabove, the distinction between an agent and a person who held himself out as an independent contractor for interstate shipments of household goods, such as a person who is commonly known as a broker, was

preserved by proper instructions of the trial court. Since these issues were questions of fact they belonged to the jury alone to decide and now that they have spoken in their finding that defendant Cusack was a person within the classification set forth in Section 311(a), and that he did not have a broker's license, as required, it is submitted that their finding of fact and the judgment of trial court should not be disturbed.

B. The Trial Court Did Not Abuse Its Discretion in Denying the Motion of Defendant to Set Aside the Judgment.

A motion to vacate or set aside the judgment is within the trial court's sound legal discretion and its action will not be disturbed by the appellate court except for clear abuse of discretion. *Western Union Telegraph Co. v. Dismang,* 106 F. 2d 362. The reasoning behind this rule was set forth in the case of *W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons,* 155 F. 2d 321, cert. den. 67 S. Ct. 100, 329 U. S. 735, 91 L. Ed. ....., wherein the Court said that the discretionary nature of jurisdiction to vacate a decree is designed to prevent too ready unravelling of judgments, avoid putting a premium upon continued litigation, and promote considerateness of judicial decision.

POINT III.

The Judgment of the Trial Court Should Be Sustained Unless From a Review of the Entire Record and the Evidence, There Has Been a Miscarriage of Justice.

This Court said in *Henderson v. United States,* 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorable to the prosecution, *United States v. Manton,* 2 Cir., 107 Fed. (2d) 834, 839; *Shannabarger v. United States,* 8 Cir., 99 Fed. (2d) 957, 961; *Borgia v. United States,* 9 Cir., 78 Fed. (2d) 550, 555."

The Federal rule set forth in the *Henderson* case prevails in the State courts of California and is expressly set forth as a principle to guide the State Supreme Court and Courts of Appeal in Article VI, Section 4½, Constitution of California, which reads in part as follows:

> "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court

shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Miscarriage of justice has been defined in the case of *People v. Fleming,* 106 Cal. 357, as meaning the conviction of a person who is probably innocent.

In *Tupman v. Haberkern,* 208 Cal. 256, 280 Pac. 970, the Court said:

> "The theory of this section is based upon assumption that the reviewing court may find error in the record as a matter of law, and its effect is to release the reviewing court from the rigid rule that prejudice is presumed from error, and to enjoin upon the reviewing court the duty to declare, when confronted in the record with any one or more of the enumerated errors, whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial. Whether the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it. * * *"

Unless, after reading the evidence, the Court shall be of the opinion that a miscarriage of justice has been caused by an error in giving or refusing instructions, the judgment cannot be set aside. An erroneous instruction was held not ground for reversal where guilt appears beyond all reasonable doubt. *People v. Sprague,* 52 Cal. App. 363, 198 Pac. 820; *People v. Froelich,* 65 Cal. App. 502, 229 Pac. 471.

Conclusion.

This is a case in which the evidence is abundantly sufficient to support the verdict of the jury in finding the defendant guilty as charged in all nine counts of the information. There was no reversible error committed by the trial court in the conduct of the trial, or of the Court's instructions given to the jury. The information was adequate and the appellant had a fair and impartial trial. There is no legal or sufficient cause for setting aside the verdict, and the judgment should be affirmed.

Respectfully submitted,

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